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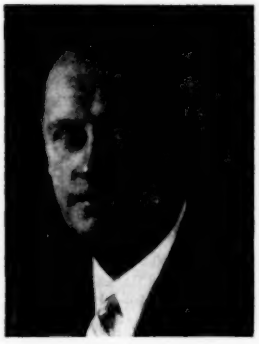
PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page



The Executive Committee, at its 1959 Mid-Winter Meeting, dealt with many matters important to the well-being and progress of your Association.

As you know, each Standing Committee includes an Ex-Officio member who is on the Executive Committee. Each of said members submitted a report, originated by the Chairman of the Standing Committee and presented by said Ex-Officio member, supplemented by oral discussion relating to the activities and problems of each of the seventeen Standing Committees.

The detailed report of the Secretary-Treasurer was carefully considered.

Quite properly, a very considerable part of the meeting was devoted to your Journal. Many recommendations and suggestions were submitted by your able Editor and others. Certain specific articles were discussed and approved as appropriate for future issues. Ways and means in which to extend the circularization of the Journal were fully discussed and will be acted upon. Preparation of a new general index of the Journal was approved.

The report of a Special Committee, appointed to consider the nominating procedures, was approved; at the present time no changes will be effected in the functioning of the Nominating Committee.

A proposed change in the By-Laws will be submitted to the membership. In lieu of the present one year term of each of the two Vice Presidents said term would be extended to two years under the proposed revision.

A resolution by the Executive Committee was prepared, expressing opposition to any proposal for compensation according to a fixed, predetermined and limited schedule of payments, without determination of fault, in cases involving persons injured in automobile accidents. Said resolution appears elsewhere in this issue, and we invite your particular attention to it.

A detailed report was submitted by the Chairman of the Open Forum Committee who has devoted a substantial amount of time and effort to assure a successful program at Banff.

The Convention Site Committee report was approved; according to present plans the Convention will be held in July in 1960 and 1962 at The Greenbrier and in July 1961 at the Queen Elizabeth, Montreal, Canada.

The Entertainment Committee submitted a full report.

May we assure you that space entirely prohibits even a meagre review of the entire agenda, but the President-Elect and we were indeed well pleased with the attention to, and disposition of, the numerous items appearing thereon.

Pursuant to instructions of the Executive Committee, we are now in the process of referring to various Standing or Special Committees several important matters on which detailed reports and recommendations are required. Careful attention was given to the problems inherent to the preparation for a Convention and which are currently somewhat more challenging, as Banff Springs Hotel will be host for the first time to our members, whose attendance in the last few years has increased substantially.

We call to your attention an announcement in this Journal regarding the Convention and also another announcement by Robert Nelson relating to his plans to arrange for the "Rollicking Rebel Special" train to Banff.

Mention of Banff prompts a personal appeal to each of the members who have made reservations at the Banff Springs Hotel. It is of course most gratifying to see such a large number of requested reservations. The Banff Springs Hotel will be able to accommodate approximately eight hundred persons. At the present time there are applications by more than one thousand.

Naturally, we would be most happy if everyone who has expressed an intention to come is able to attend the meeting. However, experience has shown that for one reason or another it has been necessary for some members, who have made actual reservations, to cancel their plans.

Our appeal is this: if due to circumstances, it is unfortunately necessary for you to cancel your reservations, will you kindly do so just as promptly as you possibly can. Such cooperation will be of great help to those members who are now on the waiting list. To those now on the waiting list who may later receive confirmation of a reservation, you will no doubt bear in mind that transportation difficulties might well be eased by a pre-convention reservation on an individual basis at Chateau Lake Louise.

If you find that cancellation is necessary, or that you have made reservations for any members of your family who will be unable to go to Banff, kindly send notice of cancellation or revised requests for reservations to the Banff Springs Hotel, with a copy to our Executive Secretary. We would deeply appreciate your cooperation in this regard.

G. ARTHUR BLANCHET,
President.

CURRENT DECISIONS

Recent decisions of the courts dealing with insurance and negligence law and practice are included in these pages. Journal readers are asked to send in digests of such rulings. Unreported cases dealing with novel questions are especially desired. Members of I.A.I.C. should submit their contributions to their State Editors.

Edited by
R. Harvey Chappell, Jr.
Richmond, Virginia

AUTOMOBILE INSURANCE—CO-OPERATION CLAUSE

Lumbermens Mutual Casualty Co. v. Goldwasser, 181 N.Y.S. 2d 439 (1959)

In an action by insurer for a declaratory judgment to determine its right to disclaim liability under an automobile insurance policy the New York court held that where an accident occurred while insured's car was being operated by insured's minor son, and where the insured on a number of occasions orally and in writing stated to the insurer that he had never given his son permission to drive the car, the testimony of the insured at a pre-trial examination (subsequent to making these statements) to the effect that his son did have permission to drive the car amounted to a breach by the insured of the condition of co-operation as required by the policy. The insured was held not to be obligated to defend.

AUTOMOBILE INSURANCE—INSURED ENTITLED TO MEDICAL PAY BENEFITS ALTHOUGH COVERED BY HOSPITALIZATION INSURANCE

Kopp. v. Home Mutual Ins. Co., 6 Wis. 2d 53, 94 N.W. 2d 224 (1959)

Insured brought suit on automobile liability insurance policy to recover under medical payments coverage for amount of hospital expenses resulting from accident while driving insured automobile. The Supreme Court of Wisconsin held that where the policy provided for payment of expenses incurred for hospital services furnished to or for named insured, and policy did not state who was required to incur such expense, the insured was entitled to recover amount of hospital bill even though part of such bill had been paid by hospitalization insurer of which insured was the subscriber at a monthly premium rate. However, the court also observed:

> "Even though the policy provision is ambiguous and must be construed against the insurer, the unreasonable result should be avoided of so construing the medical payments clause of defendant's policy as to permit the injured person to recover for medical or hospital expenses supplied to him by some third party volunteer without cost or personal liability to pay therefor on the part of such injured person."

(Contributed by Richard S. Gibbs, Milwaukee, Wisconson, Northwestern Regional Editor)

FEDERAL JURISDICTION JURISDICTIONAL AMOUNT

Lomax v. Duchow, 163 F. Supp. 873 (D.C. Neb., 1958)

The United States District Court of Nebraska construed the recent amendment to 28 U.S.C.A., §1332, increasing the jurisdictional amount in diversity cases from $3,000.00 to $10,000.00, so as to allow jurisdiction of the court and removal of a case where action was instituted to recover approximately $5,500.00 prior to the effective date of the amendment (July 25, 1958) but removed after such date. But, see *Lorraine Motors, Inc. v. Aetna Casualty & Surety Co.,* 166 F. Supp. 319 (E.D.N.Y., 1958), in which the United States District Court for the Eastern District of New York held that a federal court has no jurisdiction in a diversity of citizenship case for an amount

in controversy less than $10,000.00 where commenced in a state court asking $5,000.00 in damages, prior to July 25, 1958, but removed to the federal court after such date and the plaintiff's motion in such action to remand the case was granted. The latter court reasoned that no civil action can be removed unless it is one in which the federal court could have exercised original jurisdiction at the time of removal.

FIRE INSURANCE—
OBTAINING INSURANCE MONEY UNDER FALSE PRETENSES

Boston Insurance Company v. Jensen, 259 F. 2d 482 (9 Cir., 1958)

In an action by insured to recover under a fire policy the insurer sought ot introduce evidence that the insured was in bad financial condition so as to be able to prove a motive for the offense of attempting to obtain insurance money under false pretenses. The Court of Appeals for the 9th Circuit reversed a judgment for the plaintiff and the case was remanded for a retrial, the court holding that bad financial condition can be shown as a motive for such conduct.

FIRE INSURANCE—
"OTHER INSURANCE" CLAUSE

Kelley v. American Insurance Co., 316 S.W. 2d 452 (Tex., 1958)

Defendant insurer issued fire and extended coverage insurance on insured's dwelling and contents on August 18, 1956. On September 11, 1956, insured obtained a similar policy with Home Insurance Company. Neither company was notified or knew of the other's policy. In October, 1956, the dwelling was destroyed by fire following which the existence of the two policies was learned by the respective companies. Both policies contained provisions as to "other insurance" which prohibited other insurance unless noted on the policies. Defendant insurer denied liability on this ground. The Texas Court of Civil Appeals held that a reasonable construction of the two policies would be that the Home Insurance Company policy, being subsequent in time to the defendant's policy, afforded no insurance by its terms and therefore no insurance came into being. Under these circumstances the defendant's policy was valid, effective and operative at the time of the loss and the insured could recover from defendant. (Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

GUEST STATUTE
PROTESTING PASSENGER NOT A GUEST

Andrews v. Kirk, 106 So. 2d 110 (Fla., 1958)

Plaintiff accepted invitation to ride in defendant's automobile and during the course of the ride the defendant began to drive improperly and plaintiff protested and demanded that she be let out of the car. There was an accident and plaintiff was injured. The District Court of Appeals of Florida held that the status of the plaintiff as a guest passenger was changed to that of a passenger against her will, thereby permitting such involuntry passenger to recover for injuries on proof of either gross negligence or simple negligence, avoiding the provisions and effect of the Florida guest statute. Florida thus aligns itself with Georgia, *Blanchard v. Ogletree,* 41 Ga. App. 4, 152 S.E. 116 (1929). Compare *Akins v. Hemphill,* 33 Wash. 2d 735, 207 P. 2d 195 (1949), in which the Washington court held that when a party becomes a guest she became such for the entire journey and did not terminate the host-guest relationship by her demand to be let out of the automobile.

HUSBAND AND WIFE—
WIDOW MAY SUE HUSBAND'S PERSONAL REPRESENTATIVE FOR HUSBAND'S NEGLIGENCE

Johnson v. Peoples First National Bank & Trust Company, 145 A. 2d 716 (Pa., 1958)

In Pennsylvania, as in many other states, the rule is that one spouse cannot maintain a trespass action against the other spouse during coverture to recover damages for personal injuries caused by such other spouse. In this suit, the widow contended that she could maintain this action against her deceased husband's personal representative inasmuch as her husband's death terminated the reasons for the public policy involved, namely, the preservation of domestic harmony and

marital happiness. The Supreme Court of Pennsylvania accepted this argument and held that the action could be maintained.

HUSBAND AND WIFE—
WIFE RECOVERS FROM HUSBAND FOR SON'S TORT

Silverman v. Silverman, 145 A. 2d 826 (Conn., 1958)

The novel question was presented as to whether the wife (and mother) had a cause of action against the husband (and father) under the family automobile doctrine even though she is precluded from recovering from the child. Under Connecticut law a wife may sue her husband in tort. The wife was injured while a passenger in her husband's automobile by reason of the negligent operation of the automobile by the couple's unemancipated minor son. The Supreme Court of Errors of Connecticut held that the immunity of the son from suit did not preclude recovery against the husband and father.

LIABILITY—
LIABILITY INSURER NOT LIABLE TO INDEMNITY INSURER FOR NOT TAKING APPEAL

Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F. 2d 361 (10 Cir., 1958)

Hawkeye executed a contract of liability insurance with Northern Utilities Company with maximum coverage of $10,000.00. Indemnity had a contract with Northern Utilities Company agreeing to indemnifying it against loss in excess of $10,000.00. Northern Utilities Company was sued for a fire loss which resulted in a judgment for the plaintiff in that action in the amount of $22,636.86. Hawkeye refused to take an appeal to the Supreme Court of Wyoming and Indemnity, the excess insurance carrier, took the appeal in the name of the insured. The judgment of the trial court was affirmed. Indemnity paid the judgment in excess of $10,000.00 and then instituted suit against Hawkeye to recover the cost of the appeal, including a reasonable attorney's fee, the theory of the action being that under the facts of the case Hawkeye's failure to take an appeal constituted a breach of its contract subjecting it to such liability. The 10th Circuit Court of Appeals held that although Hawkeye's experienced counsel had recommended that an appeal be taken, Hawkeye's refusal to take an appeal was insufficient to sustain a finding of bad faith and the agreement in an insurance contract to defend a suit does not necessarily raise an obligation to prosecute an appeal. The court also pointed out that while the result of the appeal has no bearing on the question of good or bad faith, nevertheless, the results of the appeal in question tended to indicate that Hawkeye's judgment as to the possible results of an appeal was sounder than was that of its attorney.

LIABILITY—
SONIC BOOM DAMAGE WITHIN AIRCRAFT COVERAGE PROVISION

Alexander v. Fireman's Insurance Company, 317 S.W. 2d 752 (Tex., 1958)

Insured brought suit under Texas standard fire and extended coverage insurance policy covering a lumber warehouse, the plaintiff having alleged that a jet aircraft passing over the warehouse flying at low altitude and supersonic speed had created a violent pressure disturbance and propelled shock waves or compression waves against the building with such force as to unseat the girders and capsize it. The policy contained a provision covering damage by aircraft which included "direct loss by falling aircraft, or objects falling therefrom". The Texas Court of Civil Appeals held that the question of whether loss was proximately caused by the sonic boom was one for the jury and that the aircraft coverage provisions of the policy were terms of enlargement and not terms of limitation.

LIFE INSURANCE—
ACCIDENTAL MEANS

Brown v. Metropolitan Life Insurance Company, 317 S.W. 2d 651 (Mo., 1958)

Beneficiary brought suit under double indemnity provision of a life insurance policy, the policy having provided for such payment where death results through "external, violent and accidental means" and shall not have been contributed to "by disease or by bodily or mental infirmity". The insured, an attorney, was struck by one Byrnes immediately before his death during the course of an argument. The insured died of coronary occlusion. The St. Louis Court of Appeals held

that the plaintiff had failed to make out a case inasmuch as there was evidence that any one of three things was the possible cause of the insured's death, namely, the blow, the argument, or the combination of both and if the plaintiff's witnesses could not say that but for the physical violence the insured would not have died when he did, then the plaintiff had no case. The burden of proof being on the plaintiff to show the cause of death the plaintiff failed to make a submissible case.

LIFE INSURANCE–
ACCIDENTAL MEANS

New York Life Insurance Company v. Bruner, 153 N.E. 2d 616 (Ind., 1958)

Beneficiary brought action against insurer to recover under double indemnity provisions in life insurance policy. The insured voluntarily consented to administration of spinal anesthetic in connection with operation for removal of appendix. The anesthetic was properly made and administered but the insured died as a result of administration of the anesthetic due to hypersusceptibility to the anesthetic. The Appellate Court of Indiana held that the insured's death was not caused solely through "external, violent and accidental means". Drawing the distinction between "accidental means" and an unexpected result from an intentional means, the court held that the means here employed were intentional and not accidental and the fact that the result which followed was unusual, unexpected or unforeseen is not sufficient to establish liability under the double indemnity provision of the policy in question.

NEGLIGENCE–
NO CASUAL CONNECTION BETWEEN EXCESSIVE SPEED AND ACCIDENT

Underwood v. Fultz, 331 P. 2d 375 (Okla., 1958)

In a parent's action to recover damages for death of a 19 month old child who was struck by a vehicle being driven by defendant operator, the lower court entered judgment for the defendant after sustaining a motion for directed verdict at the close of the evidence and the parent appealed. The Supreme Court of Oklahoma held that where the driver was proceeding along a street at 30 to 35 miles per hour and maintaining a proper lookout but struck the 19 month old child darting across the street, under these facts excessive speed, if any, could not have been the proximate cause of the accident. Therefore, as a matter of law there was no causal connection between the speed of the vehicle and the accident and the trial court properly refused to submit the question of excessive speed to the jury since even had the operator been driving at a slower speed at the moment she would never have had an opportunity to attempt to avoid the child.

OMNIBUS CLAUSE–
INAPPLICABLE TO MILITARY VEHICLES

Voelker v. Travelers Indemnity Company, 260 F. 2d 275 (7 Cir., 1958)

Plaintiff, a sergeant in the Illinois National Guard, brought suit for a declaratory judgment that he was covered by a policy of insurance issued by defendant insurer and that it was obligated to take over the defense of the suit brought against him as the result of an automobile accident. Plaintiff insured relied upon the omnibus clause, which extended coverage "to any other automobile". The defendant contended that liability was excluded as to vehicles "furnished for regular use" to insured or "used in the business or occupation" of the insured. The 7th Circuit Court of Appeals held that the insurer was not obliged to afford coverage inasmuch as the vehicle in question was a part of a military convoy, being operated by plaintiff insured while participating in summer maneuvers and, therefore, within the policy exclusions.

OMNIBUS CLAUSE
PERMISSIVE USER

McKee v. Travelers Insurance Company, 315 S.W. 2d 852 (Tex., 1958)

Suit in equity to compel the liability insurer to pay a judgment obtained against the driver of the insured truck, one William Strickland. The policy was issued to the Kortkamp Company, by whom Strickland was employed. His employer permitted Strickland to drive the truck home at night, for storage purposes, and to drive it to work in the morning. Kortkamp Company had specifically instructed Strickland that he was not to

use the truck for any other purpose, and particularly not to drive it on personal business or pleasure. Strickland violated such instructions and while operating the truck on personal business was involved in the accident in which the plaintiff was injured. The St. Louis Court of Appeals held that the insurance carrier was not liable inasmuch as there was no permissive user of the truck at the time of the accident and consequently was not within the terms of the omnibus clause of the policy.

(Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

For a similar result see *Aetna Casualty and Surety Company v. Anderson,* 105 S.E. 2d 869 (Va., 1958).

PRODUCTS LIABILITY– EXTENSION OF MacPHERSON v. BUICK

Central & Southern Truck Lines v. Westfall GMC Truck, 317 S.W. 2d 841 (Mo., 1958)

Defendant's garage repaired the tractor unit which later was used to pull plaintiff's trailer unit. The tractor-trailer unit, while being operated along the highway, overturned and the trailer was extensively damaged. The plaintiff brought suit against the defendant on the ground that it negligently had repaired the tractor. The Kansas City Court of Appeals, recognizing that the question presented for the first time in that state was whether or not *MacPherson v. Buick Motor Company,* 217 N.Y. 382, 111 N.E. 1050 (1916) should be extended to include not merely those who manufacture automobiles but also those who contract to repair them, concluded that the lack of privity of contract or duty existing between the plaintiff and the defendant would not preclude this action and thereby extended the *MacPherson* rule.

SERVICE OF PROCESS– NON RESIDENT "OPERATING" AUTOMOBILE WHILE STARTING ENGINE

Hurte v. Lane, 166 F. Supp. 413 (N.D. Fla., 1958)

Defendant's automobile developed mechanical difficulty and was forced to stop after pulling off the highway. Defendant requested plaintiff, who was standing nearby, to pour gasoline into the carburetor. While plaintiff was doing this defendant turned on the ignition and pressed the starter following which the motor backfired and the gasoline being poured by the plaintiff burst into flames and injured him. Defendant moved to dismiss by reason of insufficiency of service of process, among other grounds. The United States District Court for the Northern District of Florida held that although there is no precise ruling on the point by the Florida courts, nevertheless, Florida's statute for service on non-resident vehicle operators should not be given such limited scope and that the vehicle was being "operated" within the terms of such statute.

WORKMENS COMPENSATION– STATE VS. FEDERAL JURISDICTION

(Longshoremen's and Harbor Workers' Compensation Act)

Flowers v. Travelers Insurance Co., 258 F. 2d 220 (5 Cir., 1958)

In an action to recover compensation under the Longshoremen's and Harbor Workers' Compensation Act a welder was injured while performing duties in making repairs on a large ocean going tanker. The vessel was in a floating drydock while the work was being performed and 80% of the welder's work was generally ashore in the plate department of the shipyard. The district court held that the accident occurred upon navigable waters, the plaintiff was engaged in maritime employment and, therefore, was within the exclusive coverage of the Longshoremen's and Harbor Workers' Compensation Act. On appeal, the 5th Circuit Court of Appeals affirmed the ruling of the district court holding that the setting was wholly maritime. The vessel was an instrument of ocean commerce and if not actually floating in navigable waters was there in law. The non-maritime nature of the so-called regular work or duties of the welder is completely irrelevant.

(Contributed by J. Kirby Smith, Dallas, Texas, Etate Editor for Texas)

Resolution*

WHEREAS, a recent proposal has suggested a revolutionary change in the long-established method of compensating persons injured in automobile accidents through payments to them of awards fixed and determined by limited and pre-determined schedules without regard to the fault of the motorists responsible for causing such accidents; and

WHEREAS, this proposal is fundamentally in contravention of the basic principle of tort law that a man's freedom of action is subject only to his obligation not to infringe any duty of care that he owes to others; and

WHEREAS, this basic principle of tort law is appropriate to the determination of third-party disputes arising out of automobile accidents; and

WHEREAS, such a program of fixed and automatic compensation for persons injured in automobile accidents, to be paid without regard to fault, would, most certainly:

(a) generate an unprecedently high claim frequency and a rising claim-consciousness among the American people; and

(b) create a new and potent incentive for the invention and exaggeration of claims for bodily injuries and produce a staggering increase in the number of fraudulent claims; and

(c) result in the development of a gigantic bureaucratic agency—inevitably enmeshed in politics—to receive, process and decide the avalanche of claims which are bound to arise from the ever increasing number of automobile accidents and the expected increase in claim frequency, and

(d) produce costs for the administration of such an agency and payment of such claims in total amounts so prohibitive as to jeopardize or destroy the privilege now enjoyed by medium and low-income individuals to own and operate automobiles on the public highways; and

(e) limit seriously injured persons in many instances to inadequate awards, instead of permitting them to receive, from juries of their peers, verdicts commensurate with the nature and extent of their injuries, disabilities and financial losses; and

(f) deprive American citizens of their constitutional right to have recourse to impartial courts and jury trials for the redress of their grievances; and

(g) be of no material value in alleviating court congestion, which inspired this new proposal and which, contrary to public opinion, actually exists in only a few metropolitan centers; and

WHEREAS, such a proposal may be expected to delay or impair expanded highway safety programs and thereby result in more automobile accidents with consequent injuries to more people;

Now, therefore, BE IT RESOLVED by the Executive Committee of the International Association of Insurance Counsel that any proposal for compensation according to a fixed, predetermined and limited schedule of payments, without determination of fault, is contrary to the public interest, is violative of the fundamental constitutional rights of the American people to have free recourse to their courts and jury trials, is socialistic to the extent that it does violence to our American way of life, and that it should be and must be resisted and opposed now and whenever hereafter it may be suggested.

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*Unanimously adopted by the Executive Committee at its Midwinter Meeting, February 3-6, 1959.

Thirty-Second Annual Convention
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Lowell White, Denver, Col.
George W. Yancey, Birmingham, Ala.

LADIES' COMMITTEE ON RECEPTION FOR WIVES OF NEW MEMBERS

Chairman: Mrs. J. A. Gooch, Fort Worth, Tex.

Vice-Chairmen: Mrs. Alvin R. Christovich, New Orleans, La.
Mrs. Stanley C. Morris, Charleston, W. Va.
Mrs. Forrest A. Betts, Los Angeles, Cal.
Mrs. Lester P. Dodd, Detroit, Mich.
Mrs. L. St. M. DuMoulin, Vancouver, B. C.
Mrs. Pat H. Eager, Jr., Jackson, Miss.
Mrs. Ernest W. Fields, New York, N. Y.
Mrs. Richard W. Galiher, Washington, D. C.
Mrs. F. Carter Johnson, Jr., New Orleans, La.
Mrs. Payne Karr, Seattle, Wash.
Mrs. William E. Knepper, Columbus, O.
Mrs. George L. Mitchell, London, Ont.
Mrs. Frank A. O'Kelley, Tallahassee, Fla.
Mrs. Edward T. O'Neill, Fond du Lac, Wisc.
Mrs. Charles E. Pledger, Jr., Washington, D. C.
Mrs. John F. Power, Chicago, Ill.
Mrs. Lewis C. Ryan, Syracuse, N. Y.

MEN'S GOLF COMMITTEE

Co-Chairmen: Ernest W. Fields, New York, N. Y.
Orrin Miller, Dallas, Tex.

Vice-Chairman: Edwin Cassem, Omaha, Nebr.
John H. Anderson, Jr., Raleigh, N. C.
Jesse W. Benton, Jr., Short Hills, N. J.
A. Lee Bradford, Miami, Fla.
Stanley M. Burns, Dover, N. H.
Alvin R. Christovich, Jr., New Orleans, La.
E. A. Cowie, Hartford, Conn.
Taylor H. Cox, Knoxville, Tenn.
J. Murray Devine, Manchester, N. H.
Robert G. Fraser, Omaha, Nebr.
Earl L. Hamilton, Columbus, O.
Payne Karr, Seattle, Wash.
Stanley B. Long, Seattle, Wash.
Harley J. McNeal, Cleveland, O.
Roderick G. Phelan, Q. C., Toronto, Canada
David L. Tressler, Chicago, Ill.
Harvey E. White, Norfolk, Va.

LADIES' GOLF COMMITTEE

Chairman: Mrs. Lester P. Dodd, Detroit, Mich.

Vice-Chairman: Mrs. Stanley M. Burns, Dover, N. H.
Mrs. A. Lee Bradford, Miami, Fla.
Mrs. Raymond N. Caverly, New York, N. Y.
Mrs. Frank X. Cull, Cleveland, O.
Mrs. Ben O. Duggan, Jr., Chattanooga, Tenn.
Mrs. Kraft W. Eidman, Houston, Tex.
Mrs. John C. Graham, Hartford, Conn.
Mrs. John H. Royster, Peoria, Ill.

MEN'S BRIDGE AND CANASTA COMMITTEE

Chairman: J. H. Gongwer, Mansfield, O.

Vice-Chairman: L. Duncan Lloyd, Chicago, Ill.
John D. Andrews, Hamilton, O.
Newton E. Anderson, Los Angeles, Cal.
Harold A. Bateman, Dallas, Tex.
Kenneth B. Cope, Canton, O.
Holly W. Fluty, New York, N. Y.
Alanson R. Fredericks, New York, N. Y.
J. T. Hammond, Benton Harbor, Mich.
Kenneth B. Hawkins, Chicago, Ill.
Alexis J. Rogoski, Muskegon, Mich.
John J. Wicker, Jr., Richmond, Va.

LADIES' BRIDGE AND CANASTA COMMITTEE

Chairman: Mrs. Kenneth B. Cope, Canton, O.

Vice-Chairman: Mrs. L. Duncan Lloyd, Chicago, Ill.
Mrs. John H. Anderson, Jr., Raleigh, N. C.
Mrs. L. J. Carey, Detroit, Mich.
Mrs. Herbert F. Dimond, New York, N. Y.
Mrs. J. H. Gongwer, Mansfield, O.
Mrs. Wilder Lucas, St. Louis, Mo.
Mrs. Walter O. Schell, Los Angeles, Cal.
Mrs. Joseph A. Spray, Los Angeles, Cal.
Mrs. Wayne E. Stichter, Toledo, O.
Mrs. Price H. Topping, New York, N. Y.
Mrs. Francis Van Orman, Newark, N. J.
Mrs. Lowell White, Denver, Col.

COMMITTEE ON JUNIOR ENTERTAINMENT

Chairman: Mrs. Egbert L. Haywood, Durham, N. C.

Vice-Chairman: Mrs. Alfred J. Morgan, Jr., New York, N. Y.
Mrs. C. Clyde Atkins, Miami, Fla.
Mrs. Sanford M. Chilcote, Pittsburgh, Pa.
Mrs. James A. Dixon, Miami, Fla.
Mrs. Ron W. Fields, San Francisco, Cal.
Mrs. Alanson R. Fredericks, New York, N. Y.
Mrs. Fred B. Gentry, Roanoke, Va.
Mrs. William A. Gillen, Tampa, Fla.
Mrs. Gerald Hayes, Jr., Milwaukee, Wisc.
Mrs. Walter Humkey, Miami, Fla.
Mrs. George M. Morrison, New York, N. Y.
Mrs. Orrin Miller, Dallas, Tex.
Mrs. Denman Moody, Houston, Tex.
Mrs. J. Paul McNamara, Columbus, O.
Mrs. Harley J. McNeal, Cleveland, O.
Mrs. Harold W. Rudolph, New York, N. Y.
Mrs. Edward B. Raub, Jr., Indianapolis, Ind.
Mrs. J. Mearl Sweitzer, Wausau, Wisc.

Thirty-Second Annual Convention Convention Notes

A. FRANK O'KELLEY, *Secretary-Treasurer*
Tallahassee, Florida

The Thirty-Second Annual Meeting of the Association will be held in the beautiful Canadian Rockies at Banff Springs Hotel, Banff, Alberta, on June 30 through July 2. An excellent program and fine entertainment are being arranged, and it is expected that this will be one of our outstanding conventions.

On page four of the January, 1959, issue of Insurance Counsel Journal, President Blanchet has made very pertinent comments relative to the beauty and natural attractions of the area, as well as to some of the problems involved, particularly with respect to transportation. In addition, a very comprehensive report of the Transportation Committee accompanied Miss Dahinden's letter of January 9 announcing the convention arrangements. It is suggested that in making plans regarding Banff, our members should take advantage of the very careful study and planning which went into the preparation of these reports.

Because of the enthusiastic response of our members for reservations, the available rooms were soon exhausted and a waiting list has been established by Banff Springs Hotel. There are always some cancellations, and at this time we can only speculate as to whether there will be sufficient cancellations to permit the hotel to confirm reservations for all those whose names are now on the waiting list, and those who may yet apply for reservations. We are very hopeful that all of our members who desire to attend may be accommodated at Banff Springs Hotel.

Let us urge those of you who must cancel your reservations to do so as early as possible so that other members desiring to attend will have sufficient time to make their travel and other arrangements. In this connection, the registration fee will be refunded to those who cancel their reservations by May 15.

For those of you who will not be able to obtain accommodations at Banff Springs Hotel, reservations may be requested on an individual basis to Mr. D. A. Willian s, Manager, Chateau Lake Louise, Lake Louise, Alberta, Canada, forty three miles from Banff, or at one of the following local hotels or motels in the village of Banff: Timberline Hotel, Mount Royal Hotel, Cascade Hotel, King Edward Hotel, Gammon's Motel.

Because of the limitations of travel accommodations at a given time, serious consideration should be given by our members to a stopover in the Banff area, possibly at Chateau Lake Louise, prior to the convention.

We look forward to visiting with you at Banff.

Entertainment—Annual Meeting Banff Springs, Canada

GEORGE MC D. SCHLOTTHAUER
Madison, Wisconsin

THE THIRTY-SECOND annual convention of this association will be held at the Banff Springs Hotel, Alberta, Canada. This will be our first meeting at this beautiful resort, high in the Canadian Rockies. The number of advance reservations indicates that this will be our largest meeting.

Facilities here are most complete including two swimming pools, two golf courses, horseback riding, tennis, fishing, and mountain climbing for those who live dangerously.

First on the schedule of social events will be the traditional reception for the wives of new members at 12:30 P.M. Tuesday, Chairman of the committee for this lovely party is Mrs. J. A. Gooch, assisted by Mrs. A. J. Christovich and Mrs. Stanley C. Morris. Luncheon will be followed by Ladies Bridge Tournament, of which Mrs. Ken Cope is chairman, assisted by Mrs. L. Duncan Lloyd. The prizes are wonderful—come and win one.

At 6 P.M. Tuesday the President's Reception will be held—and you are all requested to attend and greet our officers and their ladies.

The Juniors, of which there will be many—will have a get acquainted party on Monday evening at 5:30 P.M. A fine opportunity for your heir to meet the gang—at this most international of all parties.

Following dinner in an atmosphere of Hawaiian splendor, the fabulous Hilo Hattie and her troupe will entertain us. This event will be the high light of our festivities. Dancing will follow.

Social activities on Wednesday will start with the Ladies Golf Tournament, under the chairmanship of Mrs. Lester P. Dodd, assisted by Mrs. Stanley M. Burns. Ladies, this is your opportunity to win a grand prize and play on one of the best golf courses in this continent. Also on Wednesday afternoon will be the Men's Golf Tournament under the direction of Ernest W. Fields and Orrin Miller, assisted by Ed Cassem. The Men's Bridge Tournament will start at 2 P.M. with J. H. Gongwer, chairman assisted by L. Duncan Lloyd. Outstanding prizes as usual.

Wednesday evening the old Humble Humbugs will go Hawaiian—with Hawaiian drinks and hula skirts, pushing mint juleps and hillbilly music back to the Deep South. Come be a Hula Humble Humbug!

After dinner that evening we will again be entertained by Hilo Hattie, dancing will follow, and the juniors will have their third coke tail party.

Your President and committees have planned a most elegant program for your enterainment—so you may be assured this will be a convention to remember.

Provisional Program

INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
32nd ANNUAL CONVENTION—JUNE 29, 30, JULY 1 AND 2, 1959

BANFF SPRINGS HOTEL
BANFF, ALBERTA, CANADA

Monday, June 29

9:30 A.M. Meeting of Executive Committee—Angus Room.

2:00 P.M. Registration of Members and Guests—Garden Lounge.

4:00 P.M. Meetings of Standing and Special Committees appointed by President-Elect, Charles E. Pledger, Jr. Location of meetings will be posted on Association's bulletin board in Garden Lounge.

5:30 P.M. Get Acquainted "Coketail" Party for Junior Group—Norquay Room.

Tuesday, June 30

8:00 A.M. Continued registration of Members and Guests—Garden Lounge.

9:00 A.M. GENERAL SESSION—Cascade Room.

1. Invocation—Rev. George A. S. Hollywood, Rector of St. George's in the Pines, Banff, Alberta, Canada.
2. Roll Call and Reading of Minutes.
3. Address of Welcome—Speaker to be announced later.
4. Response—Stanley B. Long, Seattle, Washington.
5. Introduction of New Members—Lester P. Dodd, Detroit Michigan, Chairman of Reception Committee for New Members.
6. Report of President—G. Arthur Blanchet, New York, N. Y.
7. Report of Secretary-Treasurer—A. Frank O'Kelley, Tallahassee, Florida.
8. Report of Executive Secretary—Miss Blanche Dahinden, Milwaukee, Wisconsin.
9. Report of Editor of the Journal—William E. Knepper, Columbus, Ohio.
10. Address—Rev. Father Robert I. Gannon, S. J., Former President Fordham University, New York, N. Y.—Subject to be announced.
11. Presentation and Recognition of Chairmen of Standing Committees.
12. Proposed Amendments to By-Laws—Forrest A. Betts, Los Angeles, California, on behalf of the Executive Committee.
13. Announcements:
    (a) Open Forum and Panel Discussion Committee—George I. Whitehead, Jr., New York, N. Y., Chairman.

Provisional Program

INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
32nd ANNUAL CONVENTION—JUNE 29, 30, JULY 1 AND 2, 1959
BANFF SPRINGS HOTEL
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(b) General Entertainment Committee— George McD. Schlotthauer, Madison, Wisconsin and J. A. Gooch, Fort Worth, Texas, Co-Chairmen.
(c) Ladies' Bridge and Canasta Committee—Mrs. Kenneth B. Cope, Canton, Ohio, Chairman.
(d) Ladies' Golf Committee—Mrs. Lester P. Dodd, Detroit, Michigan, Chairman.
(e) Ladies' Reception Committee for Wives of New Members—Mrs. J. A. Gooch, Fort Worth, Texas, Chairman.
(f) Men's Bridge and Canasta Committee—J. H. Gongwer, Mansfield, Ohio, Chairman.
(g) Men's Golf Committee—Ernest W. Fields, New York, N. Y. and Orrin Miller, Dallas, Texas, Co-Chairmen.
(h) Junior Entertainment Committee—Mrs. Egbert L. Haywood, Durham, North Carolina, Chairman.

14. Appointment of Nominating Committee.
15. Announcement by Chairman of Nominating Committee.

12:30 P.M. Ladies' Reception for Wives of New Members—Mt. Stephen Hall.

1:00 P.M. Ladies' Luncheon—Alhambra Room.

2:00 P.M. OPEN FORUM—Cascade Room.
Presiding: George I. Whitehead, Jr., New York, N. Y., Chairman, and Gerald Hayes, Jr., Milwaukee, Wisconsin, Vice-Chairman, Open Forum and Panel Discussion Committee.
(Subject to be Announced)
Oscar Bakke, Washington, D. C., Director, Bureau of Safety, Civil Aeronautics Board.
Howard Hasbrook, Tucson, Arizona, Director, Cornell Aviation Crash Injury Research Project.

2:00 P.M. Ladies' Bridge and Canasta Tournament—Mt. Stephen Hall.

5:30 P.M. "Coketail" Party for Junior Group—Norquay Room.

6:00 P.M. President's Reception—Cascade Room.

8:00 P.M. Dinner—Fairholme Room.

9:30 P.M. International Cabaret—Fairholme Room.

Wednesday, July 1

9:00 A.M. OPEN FORUM—Cascade Room

Provisional Program

INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
32nd ANNUAL CONVENTION—JUNE 29, 30, JULY 1 AND 2, 1959
BANFF SPRINGS HOTEL
BANFF, ALBERTA, CANADA

Presiding: George I. Whitehead, Jr., New York, N. Y., Chairman, and Gerald Hayes, Jr., Milwaukee, Wisconsin, Vice-Chairman, Open Forum and Panel Discussion Committee.
"New Fields for Demonstrative Evidence"—Edward D. Crocker, Cleveland, Ohio.
"Admiralty on the Ocean Air Lanes"—William J. Junkerman, New York, N. Y.
"Fixing Liability in Public Inquiries"—Alastair Paterson, Toronto, Canada.
"Preparing Negligence Cases for Trial in Canada"—Bert Richardson, Q. C., Winnipeg, Canada.

9:00 A.M. Ladies' Golf Tournament.

1:30 P.M. Men's Golf Tournament.

2:15 P.M. Men's Bridge and Canasta Tournament—Mt. Stephen Hall.

5:30 P.M. "Coketail" Party for Junior Group—Norquay Room.

6:00 P.M. Humble Humbugs' Party—Cascade Room.

8:00 P.M. Annual Banquet—Fairholme Room—to be followed by entertainment and dancing.

Thursday, July 2

9:30 A.M. GENERAL SESSION—Cascade Room.

1. Invocation—Rev. Robert J. McGuinness, Pastor of St. Mary's Church, Banff, Alberta, Canada.
2. Report of the Winners of the Ladies' and Men's Golf, Bridge and Canasta Prizes—J. A. Gooch, Fort Worth, Texas, Co-Chairman, General Entertainment Committee.
3. Unfinished Business.
4. New Business.
5. Report of Memorial Committee—F. B. Baylor, Lincoln, Nebraska, Chairman.
6. Address—Judge Kenneth P. Grubb, United States District Court, Eastern District of Wisconsin, Milwaukee, Wisconsin. (Subject to be Announced).
7. Report of the Nominating Committee.
8. Election of Officers and Members of Executive Committee.
9. Induction of new President—Charles E. Pledger, Jr.
10. Adjournment by President, Charles E. Pledger, Jr.

2:00 P.M. Meeting of New Executive Committee—Angus Room.

Notice of Proposed Amendments to By-Laws of the International Association of Insurance Counsel

NOTICE IS HEREBY GIVEN that, pursuant to Article XVI of the By-Laws, the Executive Committee will present the following proposed amendments to Article VI of the By-Laws for approval at the Annual Meeting of the Association to be held at Banff Springs Hotel, Banff, Alberta, Canada, June 30, and July 1 and 2, 1959:

That Article VI be amended in the following respects:

1. That Section 3 of Article VI be amended to read as follows:

Sec. 3. In each year the President-Elect, Vice-Presidents, Secretary and Treasurer shall be nominated and elected, in the manner hereinafter provided by the Association at its annual meeting. The terms of the officers so elected, with the exception of the Treasurer and the Vice-Presidents shall begin at the close of such annual meeting and end at the close of the next succeeding annual meeting, or at such time as their respective successors shall have been elected and qualified.

2. That Section 4 be amended to read as follows:

Sec. 4. The term of office of the Treasurer shall begin on November 1 following his election and end on October 31 of the following year, or at such time as his successor shall have been duly elected and qualified.

3. That Section 5 be added to read as follows:

Sec. 5. In the year 1959, there shall be elected two Vice-Presidents, one of whom shall be elected for a term of one year and one of whom shall be elected for a term of two years. Thereafter, there shall be elected one Vice-President each year for a term of two years; the terms of office of the Vice-Presidents shall begin at the close of the annual meeting where elected and, with the exception of the Vice-President elected in 1959 for a term of one year, whose term shall expire at the close of the next annual meeting, shall end at the close of the second annual meeting from the time of election, or at such time as their respective successors shall have been duly elected and qualified.

4. That Section 6 be added to read as follows:

Sec. 6. No person shall be eligible to succeed himself as President.

A. Frank O'Kelley
Secretary-Treasurer

It will be observed that the change to be accomplished by the proposed amendments is to extend the terms of office of the Vice-Presidents from one to two years, expiring on alternate years.

A. Frank O'Kelley
Secretary-Treasurer

Newly Elected Members of the International Association of Insurance Counsel

Admitted since January 1, 1959

JAMES P. BEGGANS—Jersey City 2, New Jersey
Beggans & Keale
75 Montgomery Street

ALBERT E. BOND—Geneva, New York
Bond & McDonald
435 Exchange Street

CHRIS B. CONYERS—Brunswick, Georgia
Gowen, Conyers, Fendig & Dickey
First National Bank of Brunswick Building

CLYDE C. CROSS—Baraboo, Wisconsin
Langer and Cross
Baraboo National Bank Building

HAROLD J. FISHER—Springfield, Missouri
Allen, Woolsey & Fisher
905 Woodruff Building

SAMUEL M. GLASGOW, JR.—Nashvile 3, Tennessee
Glasgow & Adams
816 Nashville Trust Building

JOE S. HATFIELD—Evansville 8, Indiana
Fine, Hatfield, Sparrenberger & Fine
705 Hulman Building

HERBERT W. HIRSH—Chicago 3, Illinois
Clausen, Hirsh, Miller & Gorman
135 South LaSalle Street

ROBERT C. HORRIGAN—Cleveland 14, Ohio
Davis & Young
930 National City Bank Building

BURTON J. JOHNSON—New York 8, New York
Assistant Secretary
Home Indemnity Company
59 Maiden Lane

EDGAR W. JONES—Canton 2, Ohio
Amerman, Burt, Shadrach, McHenry & Jones
250 Peoples-Merchants Trust Building

JOHN M. KILROY—Kansas City 6, Missouri
Shughart and Thomson
914 Commerce Building

RICHARD A. KNUDSEN—Lincoln 8, Nebraska
Mason, Knudsen, Dickeson & Berkheimer
714 Stuart Building

J. MARSHAL LEYDON—Boston 7, Massachusetts
The Employers' Group
110 Milk Street

HOWARD S. LUTZ—Ashland, Ohio
100 West Main Street

WILLIAM J. MCDONALD—Geneva, New York
Bond & McDonald
435 Exchange Street

DOUGLAS MCKAY, JR.—Columbia 1, South Carolina
McKay, McKay, Black & Walker
802 Barringer Building

HUGH J. MCMENAMIN—Scranton 3, Pennsylvania
Warren, Hill, Henkelman & McMenamin
700 Pennsylvania Power & Light Bldg.

ARTHUR C. MERTZ—Chicago 3, Illinois
Counsel
National Association of Independent Insurers
30 West Monroe Street

FREDERICK J. ORTH—Seattle 1 ,Washington
Assistant General Counsel
Northwestern Mutual Insurance Co.
217 Pine Street

JACKSON L. PETERS—Miami 32, Florida
Knight, Smith, Underwood & Peters
804 Ingraham Building

SAMUEL P. SEARS—Boston 10, Massachusetts
Brickley, Sears & Cole
75 Federal Street

HAROLD E. STAFFORD—Chippewa Falls, Wisconsin
Stafford, Pfiffner & Stafford
111½ North Bridge Street

WILLIAM P. THOMPSON—Wichita 2, Kansas
Hershberger, Patterson, Jones & Thompson
1022 Union Center Building

ROBERT F. UNDERWOOD—Miami 32, Florida
Knight, Smith, Underwood & Peters
804 Ingraham Building

WILLAS L. VERMILION—Hartford 15, Connecticut
Vice President
Aetna Casualty & Surety Co.
151 Farmington Avenue

H. H. WARNER—Lansing 7, Michigan
Warner & Hart
407 Mutual Building

NELSON WOODSON—Salisbury, North Carolina
Woodson & Woodson
109 West Council Street

"Rollicking Rebel Special"

ROBERT M. NELSON
Memphis, Tennessee

Pleasant memories of the special train to the San Francisco convention conducted and handled by past president, L. Duncan Lloyd, of Chicago, has brought back a yearning from some of the members who made the trip, including the writer, to repeat the relaxing, carefree pleasure and companionship of such a jaunt.

Since the Association cannot officially sponsor any one train, our genial president, G. Arthur Blanchet, and some that were on the last trip or heard about it, have asked the writer to get up this special train and, as Arthur says, "with the blessings and thanks of the Association but not under its sponsorship". Arthur further says that he has been informed that transportation accomodations may not be too convenient because of the size of our group, and I know that by plane from Memphis there would be three plane changes ending up in Banff by train.

With notice to all that I cannot make everybody as happy as "Dunc" Lloyd did in the smooth handling of his train, I have accepted the challenge to the extent that I have had meetings with railroad officials of several railroads and we have arranged for tentative itinerary.

We hope to have special pullmans from several different points beginning as far south as New Orleans and possibly Miami, but the actual special will be made up in Chicago. The plans call for the "Special" leaving Chicago at 11:45 A.M., June 27, picking up other passengers at St. Paul at 8:15 P.M. that same day. The next stopover of the "famous for its food" Canadian Pacific will be at Banff for the convention, where we arrive the morning of June 29. Leaving Banff after luncheon on July 2, at approximately 3 P.M., we go by sight-seeing bus to Lake Louise for dinner and lodging at the Chateau Lake Louise that night. The next day we leave Lake Louise by another sight-seeing bus and cross the Great Divide to Field, British Columbia, where the "Rebel" will be steamed up, panting to rollick and roll. From Field we go to the large Pacific seaport of Vancouver, arriving on the morning of Saturday, July 4.

We travel by steamer across Pudget Sound, leaving at 10:00 A.M., with luncheon on board, arriving at Victoria at 2:15 P.M., where we hope to have accomodations for all at the world famous Empress Hotel. Sunday, July 5th, at 1:10 P.M., we commence a sight-seeing tour along the coast of Vancouver to Nanaimo, where we again board a steamer, re-crossing Puget Sound back to Vancouver where the old "Rebel Special" will be hospitably waiting.

Our trip takes us northeast, over a different rail route, through new and beautiful scenery on the Canadian National Railroad to famous Jasper Park, arriving about noon, July 6. We stay there until the next day about noon, July 7, and then travel through the scenic lands of Alberta, Saskatchewan and Manitoba, the breeding grounds of the wild fowl of the North American continent, returning leisurely to Chicago and St. Paul. Our arrival in Chicago is at 2:00 P.M., July 9th.

Th train will be an all bedroom, drawing room train, with the finest equipment obtainable and Mint Juleps, Jack Daniels and Branch Water aboard. The exact cost was not obtained, awaiting information from hotels, before it was time for this to make the press deadline, but we can say that it will be an all-expense carefree trip, except for your meals and your accomodations at the convention hotel in Banff. It is known that the cost will be much cheaper than by traveling individually or in small groups and less than can be obtained otherwise. It was felt that the all-Canadian tour would be preferred in view of our previous meetings on the West Coast.

I regret to say that it is necessary to have to make it a case of "first come, first served" since there is a limit to the number the "Rebel" can accomodate and there will be only one special. You do not have to be an unreconstructed rebel like the writer

to be eligible, as the train is for any members of the Association and their guests. The Canadian Pacific representative has advised that those who are on the "Special" and do not have reservations at the convention hotel in Banff may arrange other accomodations nearby.

Those who want to get aboard, write to me, Robert M. Nelson, 1001 Columbian Mutual Tower, Memphis 3, Tennessee. Be sure to send a copy of your letter to the Professional Men's Service Bureau, (which has been obtained to work with me and with the railroads), P. O. Box 513, Memphis, Tennessee.

Bob Nelson

From the EDITOR'S NOTEBOOK

In this column, from time to time, the Editor will publish news and views that he believes may be of more than passing interest to the readers of the Journal. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed. Contributions to this column will be welcomed.

THE ROSTER of members of the International Association of Insurance Counsel will be published and distributed to the membership as a supplement to this issue of the Insurance Counsel Journal, but in the form of a separate booklet. This procedure is being followed in the belief that the Roster will have greater utility in a seperate binding and, also, that this issue of the Journal can better be preserved for future use. The Roster booklet, as usual, will contain alphabetical and geographical lists of the members, as well as the By-Laws, a list of past officers and members of the Executive Committee, and the personnel of all committees. It will be mailed to I.A.I.C. members about the same time as this issue of the Journal.

THE FOLLOWING editorial appeared in a recent issue of The Columbus Citizen, a Scripps-Howard newspaper. It merits your consideration.

"Auto insurance, we read, is due for a new ride—up.

"The insurance companies claim rates would be higher already, because they have lost $600 million on their policies since World War II, except that the losses have been made up in profits on other types of insurance.

"Insurance people, who live on statistics, say the rates must rise because the cost of accidents are rising—car repairs cost more, accidents are more serious, juries are giving higher awards. Inflation figures in, too, as it does in everything.

"There are other angles. Such as chiseling on insurance claims. Traffic Safety, published by the National Safety Council, last year called the swindling on insurance claims a "national scandal."

"All this gets to be a complicated story.

"But there is one reason insurance rates are going up which is not complicated at all. One word names it: Speed.

"Speed is a main cause of accidents, so-called. It is speed that makes these accidents more serious.

"Most people drive sanely. Those who don't are responsible for higher insurance rates—as well as death, injury and property damage on the highways. The penalties for reckless driving are frightful—but as often as not it is the innocent who pay them.

"Which makes us wonder why the public generally doesn't kick up a bigger storm about this needless murder (and expense)."

THE PRACTICE of "blackboarding" damages in a closing argument was condemned in *Botta v. Brunner*, 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331, to which reference has previously been made in these columns. Now, the Supreme Court of Delaware has spoken on the same subject in *Henne v. Balick*, decided November 25, 1958, 146 A. 2d 394.

In the *Henne* case, over objection, the plaintiff's attorney used a blackboard demonstration before the jury, one item of which was "loss of earning capacity for 38 years at $10 per week". Holding such tactics improper, Justice Bramhall says, in the opinion:

"In our opinion the value of pain and suffering cannot be ascertained by merely multiplying the number of days by a fixed rate per day. The degree thereof differs in individuals. In the same individual pain is not constant but varies from day to day. In the last analysis the reasonableness of the amount of the verdict must determine whether or not the verdict was proper. No award can be sustained unless it stands this test in the light of all the evidence. As we view this evidence, plain-

tiff was permitted by means of a blackboard demonstration of plaintiff's counsel to put in the record evidence which he would not otherwise have been permitted to introduce. It seems to us that if such evidence is to be permitted, it would be equally logical to permit expert witnesses to testify before the jury as to the reasonableness of the figures submitted for pain and suffering. No one would deny that to permit such a procedure would not only be fantastic but would be casting aside entirely the rules of procedure long followed in this country and England of permitting a jury to determine the amount to which a plaintiff would be entitled as damage for pain and suffering or other unliquidated damage based solely upon the evidence submitted.

"We think that the use by counsel for plaintiff of a mathematical formula setting forth the claim of pain and suffering on a per diem basis was merely a speculation of counsel for plaintiff unsupported by the evidence and was for that reason improper. *Botta v. Brunner,* 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331; *Herb v. Hallowell,* 304 Pa. 128, 154 A. 582, 85 A.L.R. 1004; *Vaughan v. Magee,* 3 Cir., 218 F. 630; *Goodhart v. Pennsylvania R. Co.,* 177 Pa. 1, 35 A. 191. We are also clearly of the opinion that in many cases at least the purpose of such use is solely to introduce and keep before the jury figures out of all proportion to those which the jury would otherwise have had in mind, with the view of securing from the jury a verdict much larger than that warranted by the evidence."

The White House
Dec. 31, 1958

A PROCLAMATION
by the President of the United States of America

WHEREAS *a free people can assure the blessings of liberty for themselves only if they recognize the necessity that the rule of law shall be supreme, and that all men shall be equal before the law; and*

WHEREAS *this Nation was conceived by our forefathers as a nation of free men enjoying ordered liberty under law and the supremacy of the law is essential to the existence of the Nation; and*

WHEREAS *appreciation of the importance of law in the daily lives of our citizens is a source of national strength which contributes to public understanding of the necessity for the rule of law and the protection of the rights of the individual citizen; and*

WHEREAS *by directing the attention of the world to the libery under law which we enjoy and the accomplishments of our system of free enterprise we emphasize the contrast between our freedom and the tyranny which enslaves the people of one-third of the world today; and*

WHEREAS *in paying tribute to the rule of law between men, we contribute to the elevation of the rule of law and its application to the solution of controversies between nations;*

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, *President of the United States of America, do hereby designate Friday, May 1, 1959, as Law Day in the United States of America. I urge the people of the United States to observe Law Day with appropriate public ceremonies and by the reaffirmance of their dedication to our form of government and the supremacy of law in our lives, I especially urge the legal profession, the schools and educational institutions, and all media of public information to take the lead in sponsoring and participating in appropriate observances throughout the Nation.*

THE "LEGAL Basis for Awards in Cardiac Cases" is the subject of a study being conducted by Harold F. McNiece, associate dean of the school of law of St. John's University, with the assistance of a number of prominent medical and legal authorities including Dr. Paul Dudley White of Boston, Prof. John V. Thornton of New York University and Prof. L. Whiting Farinholt of the University of Maryland. I.A.I.C. members who have materials, suggestions or views to offer, should transmit them to Dean McNiece at 90 Schermerhorn Street, Brooklyn 1, New York.

AN IMPORTANT resolution adopted by the Executive Committee at its Mid-Winter Meeting in February is set forth on page 172 of this issue. In that same connection your attention is directed

to the paper by Prof. Bruno H. Greene, "The Doctrine of 'Liability Without Fault' Should Not be Extended to Automobile Accident Cases", which begins on page 247.

IN OUR article, "Let the Manufacturer Beware!", 25 Insurance Counsel Journal, 175, we reported on *Rogers v. Toni Home Permanent Co.*, 167 Ohio St., 244, 147 N.E. 2d 612, wherein the Ohio court made some far-reaching changes in the law of warranties. Further discussion of this subject is found in *Arfons v. E. I. DuPont de Nemours & Company*, 2 Cir., November 24, 1958, 261 F. 2d 434, involving dynamite and a fuse claimed to be defective. District Judge Irving R. Kaufman, delivering the opinion of the court, says that in the *Toni* case "the Ohio court recognized that, in this modern society, laws which fitted the needs of other times must be adjusted to keep pace with society's growth and present needs." He continues, "Clearly, the key relationship is one between producer and buyer. The retailer is in the unhappy position of being governed, in the selection of many products which he sells, by consumer pressure generated by manufacturer advertising. In addition the manufacturer is in the best position to minimize the possibility of latent defects."

IN THESE days of speed and more speed, pressure and more pressure, ulcers and more ulcers, the following prayer contains a significant message:

"Slow me down, Lord; ease the pounding of my heart by quieting of my mind. Steady my hurried pace with a vision of the eternal reach of time. Give me, amidst the confusion of my day, the calmness of the everlasting hills. Break the tension of my nerves and muscles with the soothing music of the singing streams that live in my memory. Help me to know the magical restorative power of sleep. Teach me the art of taking minute vacations—of slowing down to look at a flower, to chat with a friend, to pet a dog, to read a few lines from a good book.

"Remind me each day of the fable of the hare and the tortoise, that I may know that the race is not always to the swift; that there is more to life than increasing its speed. Let me look upward into the branches of the towering oak, and know that it grew because it grew slowly and well. Slow me down, Lord, and inspire me to send my roots deep into the soil of life's enduring values, that I may grow toward the stars of my greater destiny. Amen."

(Reprinted from The Messenger of the Episcopal Church in the Diocese of Southern Ohio)

Report of Metropolitan Mid-Winter Meeting of Members of International Association of Insurance Counsel

PRICE H. TOPPING, *Chairman*
New York, New York

The seventeenth annual Mid-Winter Reception and Luncheon for members of the Association and their families and friends from the Metropolitan Area was held at the Hotel Plaza in New York on January 31, 1959.

This is a repetition of the annual get-together started during World War II when transportation was curtailed. 207 members, wives and friends attended from California, Connecticut, District of Columbia, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania and Tennessee. Once again, this was the largest attendance in this series of luncheons.

The occasion was particularly honored by the presence of a number of distinguished guests. President G. Arthur Blanchet gave brief greetings and comments. Other officers and Executive Committee members introduced were Charles Pledger, our President-Elect, Forrest A. Betts, last retiring President, Herbert Dimond, Vice-President, and Executive Committee members John Graham, Walter Schell, Pat Carey and Lewis Ryan. All were accompanied by their wives who were also introduced. Julius Wikler, recently retired Superintendent of Insurance of New York and now a consultant to the New York Department, was a guest and gave brief greetings. He expressed the regrets of Thomas Thacher, the recently appointed Superintendent of Insurance, of his inability to attend. Mrs. Wikler was also introduced.

While the foregoing suggests that there were many speeches and introductions, in fact all was brief, as this occasion is one of sociability and not speeches or business.

Those who attended were:

Mr. Marcus Abramson, New York, N. Y.
Mr. Leonard Amdursky, Oswego, N. Y.
Mr. & Mrs. Milton L. Baier, Buffalo, N. Y.
Mr. William O. Barnes, Jr., Newark, N. J.
Mr. Robert J. Bell, New York, N. Y.
Mr. Alfred C. Bennett, New York, N. Y.
Mr. & Mrs. Fred Benson, New York, N. Y.
Mr. & Mrs. Forrest A. Betts, Los Angeles, Calif.
Mr. & Mrs. Morgan F. Bisselle, New Hartford, N. Y.
Mr. & Mrs. Arthur Blanchet, New York, N. Y.
Miss Dorothy Bleakley, New York, N. Y.
Mr. & Mrs. Alfred Bohlinger, New York, N. Y.
Mr. & Mrs. J. Kenneth Bradley, Bridgeport, Conn.
Mr. Myer Braiman, Rochester, N. Y.
Mr. & Mrs. Richard Burns, New York, N. Y.
Mr. & Mrs. L. H. Carey, Detroit, Mich.
Mr. & Mrs. James Carter, Albany, N. Y.
Mr. Ray Caverly, South Orange, N. J.
Mr. & Mrs. Ross Chamberlin, New York, N. Y.
Mr. Joseph P. Craugh, Utica, N. Y.
Mr. & Mrs. Horace Crowell, New York, N. Y.
Mr. & Mrs. Reid Curtis, Merrick, N. Y.
Mr. & Mrs. John De Luca, New York, N. Y.
Mr. James Dempsey, White Plains, N. Y.
Mr. & Mrs. Lynn Detweiler, Philadelphia, Pa.
Mr. Braxton Dew, Hartford, Conn.
Mr. & Mrs. Herbert Dimond, New York, N. Y.
Mr. James Doak, Philadelphia, Pa.
Mr. James B. Donovan, New York, N. Y.
Mr. Walter G. Evans, New York, N. Y.
Mr. & Mrs. William W. Evans, Paterson, N. J.
Mr. & Mrs. Donald Fager, New York, N. Y.
Mr. Edmund Fitzgerald, Utica, N. Y.
Mr. Meyer Fix, Rochester, N. Y.
Mr. & Mrs. Thomas Flood, White Plains, N. Y.

Mr. Carmen W. Follett, Rochester, N. Y.
Mr. & Mrs. Alanson R. Fredericks, New York, N. Y.
Mr. & Mrs. Donald Gallagher, Albany, N. Y.
Mr. & Mrs. Frederick M. Garfield, New York, N. Y.
Mrs. Carla Geminder, White Plains, N. Y.
Mr. & Mrs. Eugene C. Gerhart, Binghamton, N. Y.
Mr. Edward German, Philadelphia, Pa.
Mr. & Mrs. William V. Gough, Rochester, N. Y.
Mr. & Mrs. Paul Gouldin, Binghamton, N. Y.
Mr. & Mrs. Alex Gourlay, New York, N. Y.
Mr. & Mrs. John Graham, Hartford, Conn.
Mr. & Mrs. Richard Hartig, Buffalo, N. Y.
Mr. & Mrs. Egbert L. Haywood, Durham, N. C.
Mr. & Mrs. Joseph Head, Philadelphia, Pa.
Mr. & Mrs. Paul Higginbothom, Baltimore, Md.
Mr. & Mrs. Leffert Holz, New York, N. Y.
Mr. & Mrs. William A. Hyman, New York, N. Y.
Mr. & Mrs. George Ingalls, Binghamton, N. Y.
Mr. & Mrs. Bert Johnson, New York, N. Y.
Mr. William Junkerman, New York, N. Y.
Mr. & Mrs. John D. Kelly, New York, N. Y.
Mr. & Mrs. James S. Kernan, Utica, N. Y.
Mr. & Mrs. William D. Kiley, Oneida, N. Y.
Mr. & Mrs. John J. Killea, New York, N. Y.
Mrs. Helen Kristeller, Newark, N. J.
Mr. Harry La Brum, Philadelphia, Pa.
Mr. & Mrs. Arthur Lamanda, New York, N. Y.
Mr. David F. Lee, Norwich, N. Y.
Mr. & Mrs. Clarence I. Lord, Trenton, N. J.
Mr. & Mrs. Newell Lusby, New York, N. Y.
Mrs. Bland Maloney, New Haven, Conn.
Mr. & Mrs. Arthur Markowitz, York, Pa.
Mr. William Marks, Rochester, N. Y.
Mr. & Mrs. William F. Martin, New York, N. Y.
Mr. Donald M. Mawhinney, Syracuse, N. Y.
Mr. Al Mayer, New York, N. Y.
Mr. Percy McDonald, Memphis, Tenn.
Mr. Edward McLaughlin, Syracuse, N. Y.
Mr. Frank McNiff, New York, N. Y.
Mr. Donald Miller, Syracuse, N. Y.
Mr. & Mrs. Alfred J. Morgan, New York, N. Y.
Mr. & Mrs. George Morrison, New York, N. Y.
Mr. & Mrs. Thomas Mount, Philadelphia, Pa.
Mr. & Mrs. Joseph H. Murphy, Syracuse, N. Y.
Mr. & Mrs. Joseph O'Brien, Brooklyn, N. Y.
Mr. & Mrs. Dennis O'Connor, White Plains, N. Y.
Mr. & Mrs. Thomas O'Malley, New York, N. Y.
Miss Mary O'Malley, New York, N. Y.
Mr. & Mrs. Samuel P. Orlando, Camden, N. J.
Mr. & Mrs. Alexander Orr, Jr., New York, N. Y.
Miss Madeline Ossman, New York, N. Y.
Miss Norma Oswald, New York, N. Y.
Mr. Edward Pacelli, New York, N. Y.
Mr. & Mrs. Charles E. Pledger, Jr., Washington, D. C.
Mr. & Mrs. William Richardson, New York, N. Y.
Mr. & Mrs. Merl Rouse, New York, N. Y.
Mr. & Mrs. Orlando Rudser, New York, N. Y.
Mr. & Mrs. Lewis Ryan, Syracuse, N. Y.
Mr. & Mrs. Walter O. Schell, Los Angeles, Calif.
Mr. & Mrs. Raymond J. Scully, New York, N. Y.
Mr. & Mrs. Jerome Searl, Syracuse, N. Y.
Mr. & Mrs. Harold Shapero, New York, N. Y.
Mr. & Mrs. Robert Shaw, Newark, N. J.
Mr. William Shumate, New York, N. Y.
Mr. & Mrs. Robert Skipworth, Rochester, N. Y.
Mr. & Mrs. Samuel Smalkin, Baltimore, Md.
Mr. Clater W. Smith, Baltimore, Md.
Mr. & Mrs. Eric P. Smith, Rochester, N. Y.
Mr. & Mrs. Conrad Stearns, Binghamton, N. Y.

Mr. & Mrs. Wayne Stichter, Toledo, Ohio.
Mr. Don Stichter, Toledo, Ohio.
Mr. & Mrs. Thomas Sullivan, Rochester, N. Y.
Mr. Don Swartz, Philadelphia, Pa.
Mr. Michael Telasca, Rochester, N. Y.
Mr. & Mrs. Richard B. Thaler, New York, N. Y.
Mr. & Mrs. Carlton Thompson Binghamton, N. Y.
Mr. & Mrs. Price H. Topping, New York, N. Y.
Mr. & Mrs. Mark Turner, Buffalo, N. Y.
Mr. & Mrs. Francis Van Orman, Newark, N. J.
Mr. & Mrs. Richard Wagner, New York, N. Y.
Mr. & Mrs. Thomas Watters, New York, N. Y.
Mr. Luther Ira Webster, Rochester, N. Y.
Mr. & Mrs. Victor D. Werner, New York, N. Y.
Mr. & Mrs. Donald Wilson, White Plains, N. Y.
Mr. & Mrs. George Whitehead, New York, N. Y.
Mr. & Mrs. Julius Wikler, New York, N. Y.
Mr. & Mrs. Joseph Woods, White Plains, N. Y.
Mr. & Mrs. Saul J. Zucker, Newark, N. J.
Mr. Melvin H. Zurett, Rochester, N. Y.

Work-Life Expectancy

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HISTORY OF LIFE EXPECTANCY TABLES.

I.

HISTORY discloses that the first recorded use of a so-called life expectancy table was by the Romans around 3 A.D. In fact, legal opinions were written between 2 A.D. and 10 A.D., interpreting the validity of contracts similar to our modern life insurance agreements. These contracts provided for the payment of a sum of money on the termination of a specific life, and there developed, prior to the inception of the first such contract, counterparts of our present-day scientific actuary. Domitius Ulpian, a man of science, and Aemilius Macer, Roman lawyer, concocted a life table based upon scientific principles which was widely used in writing insurance contracts and evaluating annuities for life and terms certain; however, it is worthy of note that there is no record of the precursor life table ever being used for the purpose of estimating loss of earnings.

While modern actuarial science, as such, first came into being around the middle of the 15th century in several central European countries, it first obtained prominence in England through the Equitable Society for the Assurance of Life and Survivorship. When first created in 1762, "Equitable" utilized tables of premiums prepared by two English mathematicians, Mr. James Dodson and Mr. Thomas Simpson. However, these particular tables were soon found to be wholly inadequate since they were based, in part, upon figures computed during the year of the great plague, 1740. Suffice it to say that insurance premiums were a trifle exorbitant as a result thereof. Because of this inaccurate study, Dr. Richard Price, between the years 1755 and 1780, prepared his celebrated Northampton Table from bills of mortality kept in the Parish of All Saints, a town in the north of England. While this table was constructed some two centuries ago and was based upon a limited number of lives, it achieved vast notoriety among actuaries, insurance companies, and later, in personal injury suits. This last item, of course, is of recent development as shall be more elaborately expounded on as we progress through this study.

Even though the Northampton Table is still used in courts of law in this country, it was quickly succeeded in England by the Carlisle Table, constructed by Joshua Milne from materials furnished by Dr. John Heycham. Although an improvement, the Carlisle Table still is limited in scope, since it was devolved from two studies of the population of the parishes of St. Mary and St. Cuthbert, Carlisle, (England) in 1780 and 1787 and the abridged bills of mortality of these parishes for the years 1779 to 1787. The first such study involved a population of 7,677 and the latter, 8,677. While the facts are as above, the Carlisle Table has been widely received as can best be emphasized by the following language from just one case of a myriad number on this subject:

> "It (Carlisle Table) was received with a high degree of favor among insurers and others concerned with forecasting the probable duration of life. It almost entirely superseded the Northampton Table, and others still earlier, now altogether obsolete. It is said of this Carlisle Table in the Encyclopedia Brittanica (Volume 13 (9th Edition) page 169) that 'no other mortality table has been so extensively employed in the construction of auxiliary tables of all kinds for computing the values of benefits depending upon human lives.' Insurers now resort to their own experience tables, compiled from their statistics of selected lives, but there seems to be no successor to this general table of mortality." *Camden & A. R. Co. v. Williams,* 61 N.J.L. 646, 40 Atl. 634 (1898).

To illustrate the continued use of the Carlisle Table, in 1944, Attorney General George F. Barrett of Illinois issued a man-

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ual of inheritance tax law and procedure which states at page 75 that "in practice, the Carlisle Table of mortality is generally used." The above instruction is still followed in inheritance tax cases up to the present date.

Concurrently with the Carlisle Table in England, actuarial science in the new world had its birth in the year 1789. Based upon selected groups of the general population in Massachusetts and New Hampshire, Professor Edward Wigglesworth of Harvard University published a table of life expectancy bearing his name. Because of its limited subject matter, this first American study received little support by those in the trade. While the actuaries themselves, the experts in the field, utilized the Wigglesworth Table to a limited extent, the legal profession and the judiciary have not been as selective. In our own State of Illinois, the Wigglesworth Table has been accepted and recognized, perhaps for patriotic reasons, certainly not for the purposes of accuracy. See *Henderson v. Harness,* 184 Ill. 520, 56 N.E. 786 (1900); *Calvert v. Springfield Electric Co.,* 231 Ill. 290, 83 N.E. 184 (1907); *Winn v. Cleveland C.C & St. L. R.R. Co.,* 239 Ill. 132, 87 N.E. 954 (1909).

Despite the obvious disadvantages of Professor Wigglesworth's Table, the next well-known American attempt was not made until 1868 and then by the Mutual Life Insurance Company of New York. The so-called American Experience Table was the result. Of greater value than its predecessor, this table was accepted by the trade, but was succeeded in 1918 by the American Men Mortality Table, prepared and based on the experiences of insured lives between 1900 and 1915. Not to be outperformed by private individuals, the government finally entered the life table field in 1936. The U. S. Life Tables published at that time were created from census figures developed between the years 1900 and 1930. This table has been utilized extensively since it recorded mortality rates among different groups and classes of the population. U. S. Life Tables or American Mortality Tables, as they are commonly called, are now also available from data based on the 1940 census and deaths in 1939 and 1941. One inherent advantage of government publications such as the U. S. Life Table and the tables published by the Railroad Retirement Board, to be discussed later, is their susceptibility for being judicially noticed by trial court judges. This factor, of course, in addition to periodic supplements by reason of passage of time, has made this table extremely popular particularly in judicial forums.

At the present time practically all of the well recognized and financially sound Amercian insurance companies are using the Commissioner's 1941 Standard Ordinary Mortality Table (known as C.S.O.). This table is also utilized extensively in litigation by reason of its recent origin and resultant higher life expectancy figures. C. S. O. has been recognized by actuaries as being scientifically sound and reliable in the computation of risks and insurance premiums.

Another government publication recently computed and considered to be highly reliable, is the so-called Railroad Retirement Board Table. Since the Railroad Retirement Board, an agency of the executive branch of the federal government, is required by law to report to the Budget Bureau its financial standing, the board has been empowered to adopt a mortality table in order to compute the cost of its pension plan. This mortality table concerns deaths among railroad employees only, but is considered to be a standard mortality work.

In concluding the first section of this study, it is hoped that something of practical value has been learned from the pages of actuarial history. Namely, the courts and, undoubtedly, many lawyers, still utilize and recognize as reliable, old actuarial studies which are more favorable to the defendant than modern tables. If tables such as Northampton, Carlisle, Wigglesworth, American Experience Table, etc., are used by plaintiff, cross-examination on the accuracy of these tables is of little value to the defendant, since the tables reflect lower life expectancy figures than their modern day contemporaries. In other words, why attempt to impugn and discredit that which, relatively speaking, is helpful. So that there will be no misunderstanding, the above suggestion as to limited cross-examination applies only to the figure taken by the testifying actuary from the table reflecting life expectancy and certainly is not intended to imply to the theory of computing the present value of possible future earnings by the use of any life expectancy table.

II.

USE OF LIFE EXPECTANCY TABLES IN PERSONAL INJURY AND DEATH CASES.

What are life expectancy tables? In every day language the title is self-explanatory. They simply provide an estimate of the number of years a person will live from his then present age. Generally, they are derived from a study of a selected group of persons. The group may be from one community or many, one particular industry or of a class of people, such as selected insurance risks holding contracts with a particular life insurance company. Naturally, as the proficiency of medical science has increased, the later and more modern tables reflect said improvements by higher figures for each age, particularly in the lower age categories where the differences in life expectancy between modern and older tables are of amazing proportions.

After defining life expectancy, the first question that undoubtedly presents itself to logical minds which have heretofore not been exposed to this subject, is the following: "Why do the courts use life expectancy in personal injury and death cases in computing loss of earnings? Isn't it obvious that a person does not earn money every day of his life? What about sickness, permanent disability, voluntary or involuntary retirement, leaves of absence, and sundry other conditions which tend to affect the amount of loss of earnings?" Since the courts universally use life expectancy tables and this is so well-known as to render it unnecessary to supply citations in support thereof, it is one purpose of this study to supply an answer to the above questions.

It is often said by members of the bar and judiciary that if you sincerely and honestly wish to learn the reasoning for the adoption of a legal maximum, be it procedural or substantive, you must search for the inception or beginning of the theory concerned. This is so by reason of that old maxim "stare decisis." A rule is adopted by some court in the far distant past and it is blithely accepted by reason of the precedent. As time passes the rule becomes ingrained in the minds of lawyers and judges and perhaps, more important, in the cumulative pages of case reports. Eventually it becomes so well accepted that it is not questioned and those who suggest that the rule was not well founded are ignored. While old precedents have undergone a tremendous revamping in recent times, particularly in the field of social reform, unfortunately, such has not been the case where a corporation seeks the abolition of a well-worn rule which was originally ill-conceived. The case of the use of life expectancy tables is a perfect example of the foregoing as will readily be seen from an examination of its beginnings in the law.

(1) The use of life expectancy tables in injury and death cases sprang directly from prior use of such tables in property cases wherein it was necessary to place present value on a life estate. In order to illustrate the above, the inception of the use of life expectancy tables in injury cases in a number of states and the United States Supreme Court will be shown below.

(a) *New York*

The first reported New York case wherein the estimated life expectancy of a decedent was permitted to go to the jury in order to arrive at a damage figure is that of *Sauter v. N.Y.C. & H. Railroad Co.*, 66 N.Y. 50 (1876). In *Sauter*, the action was brought by the administrator of the estate of a passenger killed in an accident of one of defendant's trains. Defendant objected to the introduction of life expectancy figures and appealed. The court stated:

> "The Northampton Tables were properly received. *(Schell v. Plumb*, 55 N.Y. 592) The probable duration of the deceased's life was an element in estimating damages and being so, was proper to give this evidence upon the question."

As authority for using life tables, the court in *Sauter* cited *Schell v. Plumb* 55 N.Y. 592 (1874). Yet, the *Schell* case was an action brought to recover damages for an alleged breach of a contract made between plaintiff and defendant's testator, by which the latter, for valuable consideration, agreed to support the former for his life. The tables were introduced and admitted then, for the purpose of estimating the life span so as to accurately adjudge the worth of the contract for life. Certainly, proper and relevent, but why authority for allowing use of such a table in a death case to compute loss of earnings. This is the background of adoption of this rule in New York, which has been followed to this day without deviation or reflection.

(b) ***Kentucky***

In *Louisville, Cincinnati and Lexington Railroad Company v. Mahoney's Administratrix,* 70 Ky. 238 (1870), a track laborer, employee of the defendant, was killed in a train derailment. During the trial an actuary testified as to the life expectancy of the deceased. On appeal, the supreme court, in this case of first impression, held as follows:

> "The appellant also complains that the court erred in permitting a witness to testify as to the probable period of Mahoney's natural life by reference to a recognized American Life Table; but in this, the action of the court was in conformity to the decision of this court in *O'Donnell v. O'Donnell's Executor,* 3 Bush 216."

The case cited as authority for the admission, *O'Donnell v. O'Donnell's Executor,* 66 Ky. 216, 3 Bush 216, (1867) again involved property and determination of value:

> "The real estate of the deceased husband having been sold by judgment of the Circuit Court, without assignment of dower in the distribution of the proceeds of the sale; the present value of the widow's right of dower therin should be estimated as a six percent annuity for her probable expectancy of life, according to the rule recognized by this court for calculating the probable time a person may be expected to live."

Again, we find that precedent arose by reason of a misconception subtly concealed, namely, if admitted in property cases, why should they not also be admitted in death and injury cases.

(c) *Tennessee*

The Tennessee Supreme Court in *Railroad Company v. Ayers,* 84 Tenn. 725 (1886), likewise fell into the same error. In this case, a passenger was permanently injured in a derailment and on appeal it was stated:

> "There are several such tables, English and American, and any of them shown to be used by reputable insurance companies, with such other proof as the parties may offer, either as to the condition of the individual or the general mortality of the community, would be admissible. This is recognized in *Carnes v. Polk,* 5 Heis 244, where it was also properly held that habits, age, and constitution of a life tenant should be taken into consideration in estimating the expectancy of life, and the value of the life estate."

(d) *Iowa*

Donaldson, Administrators v. The Mississippi and Missouri Railroad Company, 18 Iowa 280 (1865) is the first reported Iowa decision involving this subject and as you examine the earliest cases on this topic, is often cited as authority by the supreme courts of other states for the rule that life tables are admissible. While it is continuously relied upon, the decision contains only the following comment on this question:

"The Carlisle Tables, the standard tables on that subject, however, were completent, according to the holding of this court in the case of *Bowman v. Woods,* 1 G. Greene, 441 * * *."

What does the *Bowman* case involve? It holds that standard medical books are admissible and evidence. Obviously, then, the court in *Donaldson* completely ignored the all important question of relevancy and did not even consider the ramifications of its decision. Yet it has been cited in a countless number of decisions of other jurisdictions and established the law of Iowa to this date.

(e) *United States Supreme Court*

In *Vicksburg & Meridian Railroad Company v. Putnam,* 118 U.S. 545 (1886), the question was presented to the Supreme Court. It was summarily disposed of with the following language:

> "In order to assist the jury in making such an estimate, standard life and annuity tables showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. 9 Wall 513; *Rowley* v. *London & Northwestern Ry.,* L. R. 8 Ex. 221; *Sauter* v. *New York Central R. R.,* 66 N.Y. 50; *McDonald* v. *Chicago & North Western R. R.,* 26 Ia. 124; *Central R. R. v. Richards,* 62 Ga. 306."

Since the Supreme Court did not explain, discuss or justify its ruling, we must, out of necessity, look to the authorities cited by the court in reaching its ruling. Again "precedent" appears, for the authorities cit-

ed are not imposing, to say the least. The court first relies upon the *D. S. Gregory,* 9 Wall 513. In this case, the question was neither raised nor mentioned in the opinion. Next, is *Rowley* v. *London Ry.,* which will be fully discussed in a following section of this study. Suffice it to say here that in this landmark decision, the justices allowed life tables in evidence for purposes other than computing loss of future earnings. *Sauter* v. *New York Central R. R.,* the next cited authority, has been discussed, *supra. McDonald v. C & NW R. R. Co.,* was based on the authority of *Donaldson* v. *Mississippi,* discussed and descredited, *supra.* Last, is *Central R. R. v. Richards,* wherein the ruling was predicated on the earlier decision of *Macon & Western R. R. Co. v Johnson,* 38 Ga. 409 (1868). In *Macon,* the actuary did not introduce life expectancy, but work life expectancy, which will be fully discussed herein. After examination of this first Supreme Court dicision, we find then that the court was misled by previous decisions and followed them religiously, apparently without careful scrutiny of the reasoning employed therein. As a result, the Supreme Court ruled: *Vicksburg* became the law and has been constantly cited in later cases as the ruling of the highest court in the land on this troublesome subject, further concreting a false standard.

(2) The earlier cases further reveal that while life tables were admitted, a majortiy of decisions indicated judicial uncertainty and fear of eventual results of their rulings.

(a) *Phillips* v. *London & Southwestern R. R. Co.,* 49 Law J. Rep., Queens Bench, 233 (1879). Undoubtedly, the *Phillips* case, a part of English law, has been utilized by courts in the United States to justify adoption of the rule permitting life expectancy tables into evidence. However, examination of the language of the justices in this decison indicates that they were most concerned about this doctrine and allowed evidence of life expectancy despite misgivings about it. Justice Brett stated the following pertinent remarks, "As to compensation for money loss in the time to come, supposing there had been no accident, there are a thousand cirmumstances which might have prevented the plaintiff from earning a fixed income. He would be subject to the ordinary illnesses of life and to the ordinary vicissitudes of trade, and when you come to consider all the circumstances, of which evidence cannot possibly be given, it is beyond the region of practical life that an accurate arithmetical compensation can be given." Likewise, Justice Cotton made the following comments somewhat similar to those of Justice Brett, "You cannot by 'any mathematical process or rule of sum arrive at a fair compensation for money loss, but taking the income, you must look at its nature, the probability of its continuance, how far it depends on favor, how far on exertion, which may or may not be carried on for long, and having taken into consideration all the circumstances affecting it, say what is a reasonable sum to be awarded as compensation. A jury, of course, would not give the amount of his income as an annuity for the rest of the plaintiff's life, nor assure that the income would always continue as it did at a particular time, but the income must necessarily, in my opinion, be taken as a basis, if not the basis of the compensation."

(b) *Rowley* v. *London & Northwestern R. R. Co.,* L. R. 8 Ex. 221 (1873).

Here we have the case which was cited by the United States Supreme Court in support of the admission of life expectancy tables to compute loss of future earnings. A careful study of the facts discloses that *Rowley* supplies no authority for such a theory. In *Rowley,* the executrix brought an action under Lord Campbell's Act (father of all wrongful death statutes) against defendant railroad for the death of decedent while a passenger on defendant's train. Decedent had contracted with his father to pay his mother an annuity of 200 pounds per year during the joint lives of both in return for good and binding consideration. In order to assist the jury in arriving at a damage figure for the loss of this annuity, the Carlisle Life Tables were introduced in evidence to compute the life expectancy of both descedent and his mother. Also, the court was careful in limiting admission for that purpose. Why then, is this decision any authority for admission of such tables in the ordinary death or injury case where the only question for determination is loss of future earnings? Why did the United States Supreme Court cite *Rowley* as authority for this proposition? Obviously, a case of misinterpretation, however, a costly one to present-day defendants in personal injury suits. Undoubtedly, however, the court in *Rowley*

made a proper decision on the facts with which they were presented.

(c) *Steinbrunner* v. *Pittsburgh & W. R. R. Co.,* 146 Pa. St. 504, 23 Atl. 239 (1892).

This scholarly and lengthy opinion has been selected as an example of one of many of the same type. The language used exemplifies judicial thinking of that era regarding life expectancy:

> "Estimating the damages for the death of the deceased, his expectation of life became an element of importance. His earning power being fixed by the evidence, the next question to be settled by the jury would naturally be, how many years will he probably live to exercise this power? This can never be decided accurately in single cases. The most a jury or anyone else can do is to aproximate it. A man may die in a day, or he may live to earn wages for twenty years. It follows that there must always be an element of uncertainty in every case. But there are some rules to be observed which aid to some extent in such investigations. Thus, if a man is in poor health, especially if he is suffering from some organic disease which necessarily tends to shorten life, his expectancy is much less than that of a man in robust health. Again, the age of the person and his habits are among the important matters for consideration. * * * But in a case like the one in hand, where the expectation of life of the deceased was a question of fact for the jury, we are unable to see why the tables referred to were not competent evidence. Being intended for general use and based upon average results, they cannot be conclusive in a given case. That is not the question here. It is whether they are not some evidence competent to be considered by a jury. Their value, where applied to a particular case, will depend very much upon other matters such as the state of health of the person, his habits of life, his social surroundings, and other circumstances which might be mentioned. *While we are unable to see how such evidence is to be excluded, I must be allowed to express the fear that it may prove a dangerous element in this class of cases, unless the attention of juries is pointedly called to the other questions which affect it.* * * * Upon the whole, we are of the opinion the evidence referred to was properly received." (emphasis supplied)

While here the evidence was received, the language of the writer of the opinion indicates misgivings and doubts concerning his decision.

(d) *Yetzer v. Applegate, et al.,* 85 Ia. 121, 52 N.W. 122 (1892).

The language quoted below from this case has also been selected from a group of many cases wherein the identical philosophy was expounded:

> "The present worth is the actual pecuniary loss of his estate, as near as can be measured by a money standard. It seems to us it is neither just nor equitable to sum up the probable gross earnings for a whole lifetime, ignoring the items of the necessary food, clothing, and the like, also giving no consideration to the fact that old age and sickness may impair ability to labor and produce; and hold that said gross sum is the measure of recovery. The real value of the earnings of deceased to his estate may also be said to be the present worth of his life. *It is not possible to arrive at this exactly, yet, if due consideration is given to the matters heretofore stated, and if from his gross earnings are deducted his necessary expenses, we shall approximate more nearly, at least, to the actual pecuniary loss of his estate."* (emphasis supplied)

(e) *M. C. Adory* v. *Louisville & Nashville R. R. Co.,* 94 Ala. 272, 10 So. 507 (1892).

As the last example of the principles set forth in this section, the following is noted:

> "The application of any rule will be attended with more or less uncertanity, where in some respects the value is speculative. The precise loss cannot be calculated with exact accuracy. The net income which the deceased is earning at the time of his death may not have been continued for any considerable portion of the expected term of life. Sickness or accidental injuries may impair the accumulating capacity, and want of employment may diminish his earnings; while on the other hand, they may be increased as he may acquire skill and ability."

In concluding this phase of our study, after a review of the ordinary case law, is it now possible to answer the question propounded at the beginning of this discussion? Why do the courts use life expectancy in personal injury and death cases

in computing loss of earnings? The answer is twofold. First, the courts, in the earliest decisions, failed to comprehend the distinction between use of such tables in property cases, as contrasted with injury cases. Second, the life expectancy tables were admitted with grave doubts, misgivings, conditions, etc., primarily because there was nothing better presented to offer to the jury. At least, the life tables did present some type of guide, admittedly inaccurate and misleading. In other words, estimates of life expectancy were admitted "for want of something better". If such was and still is the case, cannot the combined talents of the actuarial and legal professions produce a better, more accurate guide? Must injustice and inequality of verdicts run rampant simply because no one has taken the time or effort to rectify an anomalous situation? The following section will be dedicated to an attempt to answer these questions.

III.

THE CASE FOR WORK LIFE EXPECTANCY.

(1) General principles.

In order to arrive at a solution, perhaps, a succinct statement of what is wrong with life expectancy would be appropriate. While, as stated in the opinions, any attempt to evaluate a future contingency is subject to conjecture, undoubtedly, the principal defect is that life expectancy supplies the jury with a multiplier based upon the assumption that the plaintiff would have worked steadily during every working day of the remainder of his expected life. Such a principle is an absolute fallacy and must be admitted as so by even the strongest and most loquacious advocates of the use of life expectancy tables. If the jury is attempting to compensate the plaintiff for a pecuniary loss and a large portion of said pecuniary loss is lost earnings, why should recovery be based on the false premise that everyone works steadily until death? It would appear that the courts and the bar have completely ignored the ever existing facts of illness, permanent disability, unemployment and a more modern precept of retirement with its attendant industry plans dedicated to giving their employees years of relief from everyday labors. While the bar has probably been too relaxful on this topic, many early court decisions recognized the problem but obviously, could do little in an affirmative manner, since evidence was not offered along the line desired. To prove the point, the following citations with quotations therefrom should be of interest:

(a) *City of Key West* v. *Baldwin*, 69 Fla. 136, 67 So. 808 (1915).

> "The American Mortality Tables have been made up from the combined experience of the life insurance companies of America, and have been recognized by many courts as the standard throughout the United States, and are perhaps the best means known to the ascertainment of the probable duration of life. *These tables show the probable duration of the life of a healthy person, but not the probable duration of one's earning capacity;* * * * but in order to estimate the probable duration of one's ability to earn money or to perform her own household duties and labors, it becomes necessary to ascertain the probable duration of her life, or as it is called, her life expectancy, and that, taken into consideration with all the other evidence in the case, the jury is required to determine the probable duration of the earning capacity of the person inquired about." * * * (emphasis supplied)

(b) *Greer* v. *Louisville & Nashville R. R. Co.*, 94 Ky. 169, 21 S.W. 649 (1893).

> "It is insisted by the company that it was error to its prejudice to permit the witness Blandford, a life insurance agent, to read as evidence, to the jury, the American Life Table, showing the expectancy of a man of plaintiff's age. On this there appears to be no direct authority or precedent in this state. * * * There would seem to be no reason why, as the ability to labor, and the earning capacity, of the injured party may be inquired into, the duration of that capacity and ability to labor may not be ascertained by the usual mode of computing the probable length of life. But the proof must be taken subject to the conditions surrounding the particular individual under investigation. *Hence, the existence of disease tending to shorten life may be shown, and it must also be borne in mind that mere probable continuance of life is shown by such tables, not the duration of ability to work or to earn money in old age.* * * * And when we add to these complications that a proper

discrimination must be made between the lessening of earning capacity by reason of the loss of a finger, and that occasioned by the loss of a leg, we confess the introduction of such testimony will hardly tend to enlighten the jury to any great extent." * * * (emphasis supplied)

(c) *Illinois Central Ry. Co.* v. *Houchins,* 121 Ky. 526, 89 S.W. 530 (1905), cited and followed in *Fifield's Administratrix* v. *Town of Rochester,* 89 Vt. 329, 95 Atl. 675 (1915).

"Such tables show only the probable continuance of life, and not a duration of ability to earn money. * * * They show the probable duration of life of healthy persons who are insurable risks, and the court, when requested, should tell the jury what the table shows, and that it is to be considered by them, in connection with the other proof in the case, for what it may be worth, considering plantiff's state of health and circumstances, in determining probable duration of his capacity to earn money." * * * (emphasis supplied)

While the above citations and language used therein reflect early judicial thinking, they are included herein for the purpose of illustrating judicial reasoning at the time precedent was first established in this particular field. Modern day jurists are also cognizant of the fact that life expectancy is not a true standard since it ignores the fact that laboring men do not work every day of their lives. Examples follow.

(a) *Thompson* v. *Camp,* 163 F. 2d 396 (6 Cir., 1947).

"Appellants' special request No. 2 asked that the jury be instructed to also consider decedent's health, that all persons do not live to the age of expectancy, that such is particularly true in the case of hazardous occupations, that they may not work during all the years of their life, that their earnings may not remain stationary and that the reasonably to be expected contributions may vary or diminish in the future, * * * We think the requested instruction should have been given. Mortality and annuity tables are merely guides to assist the jury in reaching its verdict; they do not furnish rules which the jury is required to follow. The various factors which are present in any particular case making the tables less applicable than they otherwise would be, are also to be considered by the jury. The hazardous occupation in which Camp was employed, the possibility of his not working during all the remaining years of his life, the fact that his earning capacity would diminish with increasing age, have a material bearing on the amount of money he reasonably would have made during the remainder of his life and in which the widow and children would share."

(b) *Wetherbee* v. *Elgin, Joliet & Eastern R. R. Co.,* 191 F. 2d 302 (7 Cir., 1951)

"Defendant urges that the actuarial testimony was based upon two false and incompetent premises: (1) That decedent's probable future earnings may be calculated on the basis of life expectancy instead of the length of time he may expect to be employed; * * * While the district court in the case at bar did not refer to the tables specifically, mention was made of Wetherbee's life expectancy, and the jury was told to consider that all persons do not live to the age of expectancy, especially in hazardous occupations, that their earnings may not remain stationary, and that the reasonably to be expected contributions may vary or diminish in the future. We hold that the admission of the tables themselves was not error, but the calculations made by the actuary, which were based in part on the tables, is another matter. His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use."

(c) *Allendorf* v. *E. J. & E. R. R. Co.,* 8 Ill. 2d 164, 133 N.E. 2d 288 (1956).

"To allow an actuary to testify to figures, which the jury might adopt as real, carries with it the danger that the jury will accept them not only as the actuary's explanation of his process of computation, but also as proof of contribution and life and work expectancy. We are of the opinion that the proper method of assisting a jury in making damage calculations is for the actuary to use neutral figures."

From the above, it is quite evident that the judiciary has recognized the irregulari-

ties in life expectancy testimony both during the early days of the use of said tables and at the present time. Obviously, the courts have comprehended the problem but have been unable to cope with it by reason of nothing better being offered as a guide to juries. Such being the case, a practical solution is both necessary and desirable.

(2) Practical application.

If we are searching for loss of future earnings, how can they best be estimated? In such a situation, obviously, work life expectancy is the answer. If it is possible to scientifically obtain such a figure, the problems heretofore discussed can finally be resolved. Work life expectancy will tell us the estimated number of years that a person will continue to labor and earn money as distinguished from the estimated number of years he can expect to live. Such a figure far more accurately represents the multiplier which juries should use if they are to correctly follow the law. While it is relatively simple to blandly state that a work life expectancy table is a panacea and the instrument for which we have long been searching, the practical considerations surrounding its computation are considerable. It is suggested that these practical considerations may well explain why this problem has not previously been recified. Foreseeable difficulties include, but are not limited to, the following questions: (1) What diminishing factors are to be used? (2) Is it possible to obtain scientific data for the computation of such tables? (3) What agency will assume such a gigantic task on its own volition?

Regarding the above difficulties, a study has been made and work life expectancy tables have been constructed by Mr. Thomas C. Smith of Chicago, Illinois. Mr. Smith wisely selected the railroad industry as the media for his computations since most of the scientific data necessary has been compiled by the Railroad Retirement Board, a governmental agency. As previously stated herein, the Railroad Retirement Board must report annually its financial standing to the Budget Bureau. In order to assure that its pension plan is actuarially sound, tables are accurately and scientifically compiled in order to evaluate needs of the plan. Out of the various tables prepared and published, Mr. Smith has utilized the following: (1) Table A-7-1946 Annual Report, supplemented periodically, which is a standard mortality or life expectancy table showing the life expectancy of railroad employees at given ages. (2) Table A-13-1946 Annual Report, supplemented periodically, which is the result of an actuarial study showing the rate at which railroad employees quit work because of disabling illness or accidents. (3) Table A-16-1946 Annual Report, supplemented periodically, which is a table disclosing the rate of voluntary retirement of railroad employees. By combining these three tables showing absolute rates of mortality, disability and voluntary retirement and using the accepted actuarial formula, Mr. Smith has created his table of work life expectancy of railroad employees.

It appears that we now have the necessary tool, but before rushing it into court for immediate battle, let us take a closer look at this table in order to see if it will stand inspection and close scrutiny.

(a) Is it all inclusive, so as to be 100 percent accurate? As can be seen, Mr. Smith's work has taken three factors into consideration in reaching a result; namely, mortality, permanent disability and voluntary retirement have been utilized. You may say, what about unemployment, leaves of absence, non-disabling periods of illness, and a myriad other decremental factors? Naturally, these conditions do affect labor production, however, a compilation of such data is almost impossible because of its divergent nature. While it is true that the above labor wasting items are not reflected in the work under discussion, the fact remains that the three most prevalent decrements are considered and computed. Also, do not lose sight of the argument that since many wasting factors are not considered, even this new table is favorable to a litigant because of its slight inaccuraces.

(b) Is it practical and workable? The answer must be a definite "yes." In a pamphlet entitled "Work Life Expectancy as a Measure of Damages" by Thomas C. Smith and Frank L. Griffin, Jr., reprinted from the "Transactions of the Society of Actuaries, Volume 4, meeting No. 10" are contained six tables on this subject, all computed from Railroad Retirement Board statistics, utilizing accepted and recognized actuarial formulas. Any actuary who has familiarized himself with these tables should be able to testify accordingly. These tables not only include work life expectancy, but also annuity tables at varied

rates of interest and contingent annuity tables. Since the basic statistical information is taken from the published reports of a governmental agency and normal actuarial principles are then utilized to arrive at a work life expectancy, the competency of such tables should be beyond question.

In fact, in the case of *Dixon* v. *U.S.*, 120 F. Supp. 747 (S.D.N.Y., 1954), the court utilized evidence of work life expectancy and referred to Smith's and Griffin's work by name. The court stated, in part, as follows:

> "We next consider prospective loss of earnings. Dixon is now 43 years of age and his life expectancy is approximately 25 years. But it does not follow that his 'work life' expectancy is equal to his life expectancy. Considering the nature of his employment, a fair estimate of his 'work' expectancy is 20 years * * *.
>
> "The present value of an annuity certain of $5,000 per year for 20 years at 4% is $67,952; at 3½%, $71,062; and 3% $74,387. The recent actuarial study which calculates the work expectancy, taking into account probabilities of death, disabilities and retirement, reflects figures which do not vary much from those under an annuity certain; at 4%, the present value is $66,819; at 3½%, $69,457; at 3%, $72,506.00[10] [[10]Smith and Griffin, 'Work Life Expectancy as a Measure of Damages in Transactions in the Society of Actuaries' (January, 1953).]"

Attached as appendices hereto are Appendix I—Work Life Tables and Annuity Tables showing the present worth of $1.00 per month while at work computed at rates of interest of 3%, 4% and 5%, and Appendix II—Suggested Method of Introducing Work-Life Expectancy Into Evidence. It is worthy of note that the annuity tables attached hereto as part of Appendix I were computed according to the accepted actuarial formula which was discussed and approved in the case of *Marshall v. Marshall*, 252 Ill. 568, 96 N.E. 907 (1911). In approving this recognized and, in fact, the only accurate method of computing annuity tables, the court made the following pertnent comment:

> "In some annuity tables the amount thus arrived at is referred to as the number of years' purchase the annuity is worth. These computations have been made by skilled and competent persons, and the tables thus compiled are regarded as a part of the mortality tables from which they have, respectively, been deduced. In compiling these tables, the expectancy of life is not used as the basis, but the results are arrived at by finding the average chance of death or life in any year up to the extremity of human life, and from that result the present value of an annuity of $1.00 at a given age and rate percent is computed. By this method of computation, the law of averages is followed throughout."

(3) How has Smith's table been received by the courts?

It can be unqualifiedly stated that the work life tables have been accepted by the courts. The writers know of only one case where such evidence was not received. In a recent Illinois case, *Howard* v. *Gulf, Mobile and Ohio Railroad*, 13 Ill. App. 2d 482, 142 N.E. 2d 825 (1957), plaintiff attempted to introduce both life expectancy and work life expectancy figures through the medium of an actuary. For some unknown reason, defendant railroad objected to the introduction of the work life data, and its objection was sustained. On appeal, defendant contended that life expectancy was not the proper value. However, the court quickly denied said argument on the ground that evidence of work expectancy was excluded by the trial court on defendant's objection. It is interesting to note that the only figure given to the jury was a life expectancy of 38.77 years, while the work life expectancy figure excluded by defendant railroad's untimely objection was 28.10 years.

Also, plaintiff's actuarial witness testified that the present value of plaintiff's future earnings based on a life expectancy of 38.77 years at 2½% would be $120,530. The jury returned a verdict for plaintiff in the amount of $125,000. If said actuary had been premitted to compute the present value of plaintiff's future earnings based on a work life expectancy of 28.10 years at 2½% he would have arrived at the approximate figure of $96,780, $23,750 less than the figure which went to the jury. Obviously, the jury accepted the $120,000 figure given them without question. The above is not only an example of the value of work life evidence, but exemplifies the

type of situation which this study is attempting to prevent in the future.

Aside from the case just mentioned and *Dixon* v. *U. S.* discussed in subparagraph (b) the question of admission of Smith's work life expectancy table has not reached an appellate court, because the trial courts have consistently admitted such tables. Said evidence has been received in the following cases:

1. *Howard Skinner* v. *CB&Q R.R. Co.*, Superior Court of Cook County, Illinois, 1949.
2. *Bouldin* v. *CRI&P R. R. Co.*, U. S. District Court (District of Minnesota, 4th Division), 1950.
3. *Henandez's Administrix v. CRI&P R.R. Co.*, U. S. District Court (Northern District of Illinois, Eastern Division), 1950.
4. *Bryant* v. *Louisville & Nashville R. R. Co.*, Circuit Court of St. Louis, Missouri, 1950.
5. *Deboer* v. *CG&Q R.R. Co.*, District Court of Minnesota, 1951.
6. *Phillips* v. *Illinois Central R.R. Co.*, U. S. District Court (Western District of Louisiana, Shreveport Division), 1952.
7. *Johnson* v. *Louisiana & Arkansas R. R. Co.*, U. S. District Court (Eastern District of Louisana, New Orleans Division), 1953.
8. *Urzedowski, Administratrix* v. *CB&Q R.R. Co.*, U. S. District Court (Northern District of Illinois, Eastern Division), 1953.
9. *Watson* v. *AT&SF Ry. Co.*, U. S. District Court, Oklahoma, 1953.
10. *Wawryszyn's Administrix v. Illinois Central R.R. Co.*, Superior Court of Cook County, Illinois, 1953.
11. *Meseraull v. Denver, Rio Grande & Western Ry. Co.*, State Court of Utah, Salt Lake City, 1954.
12. *Johnston* v. *Florida East Coast Ry. Co.*, Circuit Court of Dade County, Florida, 1954.
13. *Tindell v. Florida East Coast Ry. Co.* Circuit Court of Dade County, Florida, 1954.
14. *Moore v. Louisiana & Arkansas Ry. Co.* U. S. District Court (Western District of Louisiana, Second Division), 1955.

Also, in *McCray* v. *Illinois Central Railroad Company*, 12 Ill. App. 2d 425, 139 N.E. 2d 817 (1957), a Federal Employers' Liability Act case, while mention was not made of work-life expectancy tables, as such, the point was reached on an instructional question. The defendant tendered the following instruction which was refused by the trial court:

> 'The award of damages for loss of future earnings, if any, must be reduced to its present cash value and adequate allowance must be made for the earning power of money, and future earnings should be calculated on the length of time the plaintiff would expect to be employed rather than on the time he would expect to live. You are entitled to consider all factors or circumstances such as illness, retirement, either compulsory or voluntary, the nature and hazards of the employment of the plaintiff, accidents, the possibly of obtaining other suitable employment, death, or other like matters which might tend to increase or decrease the pecuiniary loss."

In holding that the trial court committed reversible error by refusing to give the above-quoted instruction, the court stated as follows:

> "Plaintiff overlooks that the jury were required to consider what mitigating effect, if any, to give to contributory negligence, as required by federal law. and that a jury is not allowed to assess future loss of earnings to the date a man may die rather than on how long they feel he may reasonably have been expected to work in the future."

Even though work-life expectancy tables were not discussed, the Illinois appellate court in this decision stated the basic principle upon which this study is based—a jury should not be allowed to assess future loss of earnings to the date a person may be expected to die but rather on how long he may reasonably be expected to work.

IV.

MAY WORK LIFE TABLES BE USED GENERALLY OR ONLY IN CASES INVOLVING A RAILROAD EMPLOYEE PLAINTIFF?

Unfortunately, the Smith Work Life Table is the only known one of its type. It has been accepted by the courts, but in

all of the cases where this table has been utilized the plaintiff has been a railroad employee with the exception of *Dixon* v. U. S. *supra.* What about other injury and death cases? It is not too difficult to visualize an objection being made to the introduction of the table in such cases on the ground that the table is not computed from general statistical data, but the figures are derived from a study of employees of only one particular industry. However, is such an argument a valid one? We believe not. Please keep in mind that the Railroad Retirement Board figures are based on all railroad employees as a group and not on selected crafts within the industry. As such, a general population group actually is presented. Railroad employees of today include male and female; young and old; residents of our great urban areas, suburban communities, and rural locations; executives, and common laborers; office workers, clerks, etc., as contrasted with engineers, firemen, and conductors. In addition, the railroad industry has recently negotiated a giant health and welfare plan with the majority of its represented employees. As a result, these employees are guaranteed medical and hospital care. This actually tends to increase the life expectancy of railroad employees as contrasted with the general population. Bear in mind also, that an actuarial study which concerns itself only with employed persons, certainly would tend to result in higher life expectancy figures since the factor of unemployment with its concurrent domestic problems, poor living standards, etc., is excluded.

Turning to a different argument, this study has disclosed that such ancient life expectancy works as the Northampton Table, Carlisle Table, etc., are still accepted by the courts. Recall, if you will, that the Northampton Table was based on lives in one parish in England between the years 1755 and 1780; the Carlisle Table on two parishes with populations of 7,677 and 8,677 in 1780 and that the Carlisle Table has been designated by the Attorney General of Illinois as the authority to be used in inheritance cases at the present time. Contrast, then, the actuarial studies noted above with a presentday study of almost 1,000,000 lives in every part of the United States, living in every section of the country under varied conditions, male and female, with usually only one factor in common, employment by one of a large group of American railroads. Which study is the more accurate? Obviously, the present-day figures of the Railroad Retirement Board used by Smith as basic data in computing his work life statistics are the most desirable. Since the older works are still recognized and the railroad tables are more accurate, it would defy the rules of logic for a judicial body to exclude the railroad tables from evidence whether the plaintiff be a railroad employee or not.

The courts have long recognized that actuarial testimony is simply a guide to the jury. And in such a field, because of its very nature, it is impossible to demand absolute accuracy. Therefore, practically any actuarial study has been admitted upon the laying of a proper foundation, regardless of the primary question for determination. While this is generally true, as has been demonstrated by Section II, *supra,* a search of case law has revealed a rule which sets up some type of criteria for the admission or inadmission of life expectancy tables and said rule takes into consideration the question of remoteness, which is actually the instant problem. In *Commissioner of Internal Revenue v. Maresi,* 156 F. 2d 929 (2 Cir., 1946), the court made the following statement:

> "It has long been the custom in Federal Courts to use accredited actuarial tables in order to appraise the value of future interests. True such tables will not be competent when the circumstances at bar are too far afield from the experience which the tables record and on which their forecasts are made; and we shall assume arguendo, that if it here appeared that the tables were based upon experience plainly too remote, a point of law would emerge which we should be called upon to notice. It must be remembered, however, that all actuarial tables tell us only how many individuals of a group defined by a given set of characteristics, have an added characteristic; and their applicability to the members of a group, defined by other characteristics, depends upon how far the differentia can be thought to disturb the probability."

The important language, "how far the differentia can be thought to disturb the probability" establishes a standard for admission. Applied to our situation, it is an

argument in favor of admissibility since the data on which the railroad tables is based is actually general and there is no major differentia except possibly to favor the litigant, as the railroad tables probably will produce higher figures than a general table.

Another tax case, *McMurtry* v. *Commissioner of Internal Revenue,* 203 F. 2d 656 (1 Cir., 1953) demonstrates the leniency with which life tables are dealt. While this is not an argument for the logic employed therein, the case does point to judicial feeling and such attitude is definitely favorable in answering the instant question affirmatively.

> "At the hearing before the tax court, petitioner presented two expert actuarial witnesses whose testimony, in substance, was that the actuarial data on which the tables in the regulations were based is obsolete; that the tables do not distinguish between male and female lives, despite the recognized actuarial fact that the so-called life expectancy of a woman of a given age is approximately the same as that of a man five years younger, * * *
>
> "These arguments are not novel. In large part they have already been considered and rejected by a number of courts. Moreover, petitioner's contentions were carefully examined by the tax court in the present case, and we are not persuaded to upset its conclusions. The whole problem of valuing individual life interests by resort to mortality tables is at best a matter of educated guesswork. The courts cannot demand perfection in an area so fraught with speculation and uncertainty. The fact is also not to be disregarded that as late as 1952 —ten years after the agreed valuation date of the interests here in question— approximately three-fourths of the states were still using for state inheritance tax purposes, the same actuarial table used by the Commissioner, or else the American Experience Table compiled in 1868, which is not much better from petitioner's point of view. We think, therefore, that tables which have enjoyed such widespread and longstanding use should not be rejected as wholly unreasonable, even though they may perhaps be susceptible of minor improvements in particular respects."

To illustrate the general nature of a table based on railroad employees only, the following statistics found in "Railroad Facts, 1958 Edition", published by the Association of Western Railways and based on figures released by the Interstate Commerce Commission, should be of interest. In 1955, 1956, and 1957, the average number of employees in the service of Class I railways was 1,056,216, 1,042,664, and 984,-784, respectively. The following breakdown by numbers as to types of employment for the year 1957 is worthy of note: Executives, officials, and staff assistants, including general and division officers—16,-271; professional, clercial and general employees, including employees such as clerks, stenographers and typists—189,831; maintenance of way and structures employees—170,513; maintenance of equipment and stores employees—246,191; transportation employees, other than train, engine and yard, such as truckers, telegraphers, station agents, crossing flagmen—114,-967; yardmasters, switch tenders and hostlers—14,174; train and engine service employees, including engineers, firemen, conductors and brakemen—232,837. Where could be found a more diversified cross-section of our industrial population which includes geographically the entire nation and not just limited sections thereof? Certainly, such a broad survey provides statistics of inestimable value whether the plaintiff be a railroad employee or not by reason of the above diversifications.

It also may be argued that a table computed only from data concerning railroad employees cannot be used because of Railroad Retirement. Further, that such a retirement plan is an inducement to retire, which tends to make that decremental figure a larger one than would be the case with employees of other industries. Such an argument ignores social security, particularly since the benefits thereunder have been increased substantially by recent legislation and now provide for generous annuities to the general population. Actually, Railroad Retirement simply is a substitute for Social Security, utilized by the railroad industry. Also, in addition to Social Security, practically all major industries have their own supplemental pension plans. By considering both Social Security and private pension plans, railroad workers are not in a favored position by reason of Railroad Retirement, but simply are a part of a nation-wide pension annuity plan.

In view of the above, such a table and figures taken therefrom are competent evidence, whether the litigant be a railroad employee or otherwise.

CONCLUSION.

This study was precipitated by exceptionally large verdicts now being handed down in injury and death cases which, in a large part, are direct results of actuarial testimony on life expectancy. It is alarming and actually is becoming commonplace for verdicts to coincide almost religiously with the final annuity figure based on life expectancy as stated by an actuary. In order to counteract this pernicious trend, it is hoped that the preceding comments will assist practitioners in the field and stimulate a twoprong attack on present actuarial testimony. Not only must we familiarize the courts and bar with the virtues of work life expectancy by utilizing it consistently, but a concerted attack should be made on the inherent evils surrounding the use of life expectancy in these type cases. If the above is accomplished, not only will verdicts be more in line with reality, but a worthwhile and longneeded change will have been effected in the law.

APPENDIX I.

Smith–Griffin, Railroad Employees Work Life Expectancy Table

Exact Age in Years	Number Living and At Work	Number Withdrawing from Work Before Next Exact Age Because of			Expectancy in Years of Life at Work
		Death	Disability	Retirement	
18	1,318,040	2,054	2,397	0	40.11
19	1,313,589	2,126	2,467	0	39.24
20	1,308,996	2,171	2,550	0	38.38
21	1,304,275	2,241	2,606	0	37.51
22	1,299,428	2,311	2,687	0	36.65
23	1,294,430	2,392	2,742	0	35.79
24	1,289,296	2,498	2,795	0	34.93
25	1,284,003	2,617	2,873	0	34.07
26	1,278,513	2,733	2,925	0	33.22
27	1,272,855	2,873	2,975	0	32.36
28	1,267,007	2,999	2,999	0	31.51
29	1,261,009	3,136	2,997	0	30.66
30	1,254,876	3,271	3,008	0	29.81
31	1,248,597	3,417	3,018	0	28.95
32	1,242,162	3,561	3,026	0	28.10
33	1,235,575	3,727	3,047	0	27.25
34	1,228,801	3,903	3,080	0	26.40
35	1,221,818	4,100	3,111	0	25.54
36	1,214,607	4,330	3,152	0	24.69
37	1,207,125	4,581	3,205	0	23.84
38	1,199,339	4,851	3,279	0	22.99
39	1,191,209	5,139	3,376	0	22.15
40	1,182,694	5,480	3,469	0	21.30
41	1,173,745	5,836	3,582	0	20.46
42	1,164,327	6,254	3,693	0	19.62
43	1,154,380	6,696	3,891	0	18.79
44	1,143,793	7,193	4,173	0	17.96
45	1,132,427	7,719	4,458	0	17.13
46	1,120,250	8,294	4,933	0	16.31
47	1,107,023	8,878	5,490	0	15.50
48	1,092,655	9,512	6,103	0	14.70
49	1,077,040	10,178	6,753	0	13.91

Exact Age in Years	Number Living and At Work	Number Withdrawing from Work Before Next Exact Age Because of			Expectancy in Years of Life at Work
		Death	Disability	Retirement	
50	1,060,109	10,859	7,519	0	13.12
51	1,041,731	11,599	8,391	0	12.34
52	1,021,741	12,347	9,394	0	11.57
53	1,000,000	13,131	10,381	0	10.81
54	976,488	13,930	11,488	0	10.06
55	951,070	14,736	12,853	0	9.32
56	923,481	15,538	14,485	0	8.58
57	893,458	16,305	16,456	0	7.85
58	860,697	17,006	18,916	0	7.13
59	824,775	17,656	20,559	0	6.42
60	786,560	18,060	21,237	15,329	5.71
61	731,934	18,279	21,090	10,677	5.10
62	681,888	18,435	20,527	13,239	4.44
63	629,687	18,397	19,520	18,304	3.76
64	573,466	18,073	18,078	24,960	3.08
65	512,355	14,517	0	206,323	2.39
66	291,515	10,097	0	60,033	2.82
67	221,385	8,267	0	47,683	2.56
68	165,435	6,608	0	38,803	2.26
69	120,024	5,018	0	34,539	1.92
70	80,467	3,163	0	40,344	1.62
71	36,960	1,722	0	13,284	1.94
72	21,954	1,105	0	7,872	1.92
73	12,977	706	0	4,641	1.90
74	7,630	449	0	2,721	1.87
75	4,460	284	0	1,586	1.85
76	2,590	179	0	917	1.83
77	1,494	112	0	528	1.80
78	854	69	0	300	1.78
79	485	42	0	169	1.75
80	274	26	0	95	1.70
81	153	16	0	53	1.66
82	84	9	0	29	1.61
83	46	6	0	16	1.52
84	24	3	0	8	1.46
85	13	2	0	5	1.27
86	6	1	0	2	1.17
87	3	1	0	1	.83
88	1	0	0	1	.50

Monthly Annuities for the Duration of Life while at Work

Present Worth of $1.00 per month while at work

Exact Age in Years	Expectancy in years of life at work	Basis 3% Interest	Basis 4% Interest	Basis 5% Interest
18	40.11	$272.00	$232.82	$202.20
19	39.24	268.93	230.71	200.73
20	38.38	265.78	228.54	199.21
21	37.51	262.56	226.30	197.64
22	36.65	259.26	223.99	196.00
23	35.79	255.88	221.61	194.29
24	34.93	252.42	219.15	192.52
25	34.07	248.88	216.61	190.68
26	33.22	245.26	214.00	188.78
27	32.36	241.55	211.30	186.80
28	31.51	237.75	208.52	184.74
29	30.66	233.86	205.64	182.60
30	29.81	229.86	202.67	180.36
31	28.95	225.75	199.58	178.03
32	28.10	221.53	196.39	175.59
33	27.25	217.20	193.09	173.05
34	26.40	212.75	189.67	170.39
35	25.54	208.19	186.13	167.63
36	24.69	203.51	182.47	164.75
37	23.84	198.71	178.69	161.74
38	22.99	193.80	174.79	158.62
39	22.15	188.77	170.76	155.38
40	21.30	183.63	166.61	152.00
41	20.46	178.38	162.33	148.50
42	19.62	173.00	157.92	144.86
43	18.79	167.51	153.38	141.09
44	17.96	161.92	148.72	137.19
45	17.13	156.23	143.95	133.16
46	16.31	150.44	139.05	129.00
47	15.50	144.57	134.05	124.73
48	14.70	138.62	128.95	120.34
49	13.91	132.61	123.75	115.83
50	13.12	126.51	118.44	111.19
51	12.34	120.34	113.03	106.43

Exact Age in Years	Expectancy in years of life at work	Basis 3% Interest	Basis 4% Interest	Basis 5% Interest
52	11.57	114.10	107.52	101.55
53	10.81	107.79	101.91	96.55
54	10.06	101.39	96.18	91.40
55	9.32	94.91	90.33	86.11
56	8.58	88.34	84.36	80.67
57	7.85	81.70	78.27	75.08
58	7.13	74.97	72.06	69.34
59	6.42	68.17	65.73	63.45
60	5.71	61.19	59.19	57.30
61	5.10	55.14	53.50	51.96
62	4.44	48.38	47.09	45.86
63	3.76	41.33	40.33	39.39
64	3.08	34.02	33.28	32.57
65	2.39	26.38	25.84	25.32
66	2.82	31.30	30.67	30.07
67	2.56	28.49	27.97	27.47
68	2.26	25.19	24.77	24.37
69	1.92	21.46	21.13	20.81
70	1.62	18.02	17.74	17.48
71	1.94	21.57	21.22	20.88
72	1.92	21.37	21.03	20.69
73	1.90	21.15	20.82	20.50
74	1.87	20.92	20.59	20.28
75	1.85	20.67	20.35	20.05
76	1.83	20.41	20.10	19.81
77	1.80	20.13	19.83	19.54
78	1.78	19.86	19.57	19.29
79	1.75	19.54	19.27	19.00
80	1.70	19.10	18.84	18.59
81	1.66	18.59	18.35	18.11
82	1.61	18.06	17.84	17.62
83	1.52	17.13	16.93	16.74
84	1.46	16.46	16.28	16.12
85	1.27	14.33	14.21	14.08
86	1.17	13.21	13.12	13.03
87	.83	9.38	9.35	9.31
88	.50	5.50	5.50	5.50

APPENDIX II.

Suggested Method of Introducing Work-Life Figures into Evidence through an Actuary.

Q. 1—State your name.

Q. 2—Where do you reside?

Q. 3—What is your profession?

Q. 4—Describe the nature and kind of work which an actuary performs.

Q. 5—What professional education have you received, including the degrees conferred?

Q. 6—Do you belong to any professional societies; if so, what are they?

Q. 7—In your capacity as an actuary, do you work for any insurance companies; what are they?

Q. 8—Describe the work which you perform for these various companies.

Q. 9—In your work have you used life expectancy tables?

Q 10—Are you familiar with the methods of creating life expectancy tables?

Q. 11—For the benefit of the jury, will you please state what life expectancy tables are and by what method they are conceived.

Q. 12—For how long a time have you been an actuary?

Q. 13—During that time, have you ever become familiar with a work-life expectancy table?

Q. 14—What is a work-expectancy table, as contrasted with a life expectancy table?

Q. 15—What information, if any, does a work-life expectancy table disclose?

Q. 16—What is the name of the work-life expectancy table with which you are familiar?

Q. 17—By whom was this table computed?

Q. 18—Has this table been recognized by the Society of Actuaries?

Q. 19—How has this table been so recognized?

Q. 20—Have you inspected the basic data from which this table was derived?

Q. 21—What is such data?

Q. 22—By whom was this basic data compiled?

Q. 23—Where can this basic data be found?

Q. 24—Who published this basic data and in what form?

Q. 25—Is the Railroad Retirement Board an agency of the United States Government?

Q. 26—Do you know by what method the Smith Work-Life Table was computed? If so, describe.

Q. 27—What factors does this work-life table consider, which are not included in life expectancy tables?

Q 28—Did the originator of this table utilize only accepted actuarial formulas in his work?

Q. 29—How did you arrive at the above answer?

Q. 30—Using the Smith Work-Life Expectancy table, what is the average work-life expectancy of a man ..... years of age?

Q. 31—Based on an interest rate of .....% what sum of money would be required to pay one dollar per month for the work-life expectancy of a railroad employee ..... years of age?

Q. 32—Assume that a man has a monthly salary of $..... and a work-life expectancy of ..... years, what is the present worth of that individual's future earnings utilizing an interest rate of .....%?

The Insurance Industry: A Case Study in the Workability of Regulated Competition*

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and
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I. Introduction

THE AUTHORS propose in this article to appraise, on the basis of the latest available evidence, the experience of the insurance industry since the Supreme Court's ruling in *United States v. South-Eastern Underwriters Ass'n.*[1] That decision touched off a chain of events which resulted in more intensive state regulation of many aspects of the insurance business[2] and partially exempted it from various provisions of the antitrust laws. By re-examining[3] the mechanisms that were set up to supervise and regulate the operation of the insurance industry, it is hoped that some constructive conclusions can be reached concerning the adequacy of that regulation in meeting the needs of both the insuring companies and the insured public. Further, this analysis will, we hope, be of interest to those concerned with the broader problems raised by the substitution of formal administrative regulation for the informal regulation provided by the competitive market place.

II. Public Law 15

The fundamental purpose of Public Law 15[4] was stated to be the preservation to the states of their right to regulate the business of insurance.[5] Since antitrust seemed to be the immediate expression of federal intervention, the statute provided that—except for acts of boycott, intimidation or coercion—the antitrust laws would apply to the business of insurance only in the absence of state regulation.[6] Although Public Law 15 does not expressly declare that, to be insulated from the thrust of federal power, the states must impose regulation which is effective,[7] there can be no doubt that Congress and the President[8]

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[1]322 U.S. 533 (1944). This reversal of the lower court ruling (see 51 F. Supp. 712, D. Ga. 1943) was accomplished without directly overruling the seventy-five year old doctrine laid down in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). Justice Black, speaking for the Court, noted that the *Paul* decision had only held that the commerce clause does not deprive the states of the power to regulate and tax insurance. Neither *Paul* nor any other case had required the Court to decide whether Congress had the power to regulate insurance transactions stretching across state lines. Black emphasized that "legal formulae designed to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause." 322 U.S. at 545.

[2]Many states were already regulating various aspects—including rates—of the industry. See *Whitney, Antitrust Policies: American Experience in Twenty Industries* (1958).

[3]In an earlier study one of the authors concluded that, as a result of the *South-Eastern Underwriters* case, several undesirable practices were eliminated, others were placed under state regulation, and consumers benefited from lower, more equitable rates, a greater variety of rates, and more rational rate-making. See Stelzer, *The Insurance Industry and the Antitrust Laws: A Decade of Experience*, 1955 Ins. L.J. 137-52.

[4]59 Stat. 33 (1945), as amended, 15 U.S.C. §§1011-15 (1952). For legislative history see House Legislative Calendar, 79th Cong., 1st & 2d Sess., Committee on the Judiciary, Jan. 29, 1946, No. 22, at 103. Congressional debate may be found in 91 Cong. Rec. 478-88, 1085-93, 1442-44, 1477-89 (1945).

[5]The preamble states: "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 59 Stat. 33 (1945), 15 U.S.C. §1011 (1952).

[6]Section 3 (a) states, "Until January 1, 1948, . . . the Sherman Act, . . . the Clayton Act, . . . and . . . the Robinson-Patman Anti-discrimination Act shall not apply to the business of insurance or to acts in the conduct thereof." Section 3 (b) adds, "Nothing contained in this Act shall render said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 61 Stat. 448 (1947), as amended, 15 U.S.C. §1013 (1952).

[7]Section 2 (b) states only that, upon expiration of the moratorium the antitrust laws "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." 59 Stat. 34 (1945), 15 U.S.C. §1012 (1952).

[8]In a statement issued upon signing the bill, March 10, 1945, President Roosevelt said that antitrust laws after the moratorium would be "ap-

assumed that *effective* state regulation was necessary to avoid federal intervention. Thus, Senator O'Mahoney, shortly after passage of the bill, noted that "the antitrust laws . . . are revived in all their vigor if state regulation fails,"[9] and the assistant attorney general in charge of the antitrust division recently stated, "I do not believe that an exemption exists for these activities [price-fixing, etc.] merely because a state has legislated, if it does not adequately enforce its regulations."[10] The key issue, therefore, is *not* whether the states have passed regulatory legislation,[11] but whether state regulation has, in practice, been effective.[12] Any appraisal of the effectiveness of state regulation must be made, however, with the realization that the sanctioned continuance of state regulation involved an implicit decision, not only for state as against federal control, but for a limited as against a full-bodied type of competition. This decision for partial antitrust exception is, of course, not without precedent. Rail, air and water carriers, for example, may file with their respective regulatory agencies agreements concerning rates and other matters.[13] These exemptions do not, however, license these industries to impose cartel restraints on their members. Railroads, for instance, may not agree to a pooling or division of traffic and must be accorded "the free and unrestrained right to take independent action" either before or after a commission rate determination.[14]

The argument which has long been used to justify regulation of the insurance industry, and which was marshalled to justify the partial antitrust exemption of Public Law 15, is that the rate competition which would result from a full-scale enforcement of the Sherman Act[15] is undesirable. Because of certain unique characteristics of the business of insurance, the argument continues, such competition would become destructive. Some of these unique characteristics follow:[16]

(1) A complicated financial contract makes it impossible for the policyholder to determine value received.

(2) The insurer cannot know his costs in advance.

(3) The insurer must maintain continued ability to meet contractual obligations. Consequently, the purchaser of an insurance contract has a continuing interest in the solvency of the obligor. But the insured pays a small amount (initially) relative to what he may receive. Because of this low ratio of premiums to possible liability, a company may be tempted to cut rates drastically in order to increase the number of its policyholders. As a consequence, solvency may be threatened.

(4) Reliable rate-making requires combining the experience of many insurance carriers.

Our subsequent discussion will attempt to determine whether regulation of the insurance industry,[17] as conducted by the states since the *South-Eastern Underwriters* case, has managed, in fact, to strike a bal-

[9]Speech reprinted in *Government and the Insurance Business*, 7 Casualty and Surety J. 13 (1946).

[10]Hansen, *Insurance and the Antitrust Laws*, The Insurance Broker-Age, Oct. 1957, p. 35.

[11]For a review of legislation adopted see Stelzer, *supra* note 3, at 146-48.

[12]*FTC v. National Cas. Co.*, 355 U.S. 867 (1958), sustained circuit court dismissals of Federal Trade Commission complaints against insurance advertising, on the ground that the McCarran-Ferguson Act prohibited such intervention where states had passed laws explicitly prohibiting unfair and deceptive insurance practices. The Supreme Court refused to entertain an FTC contention that, even though the statutes were not "mere pretense", unless they had crystallized into settlement administrative procedure they were ineffective and hence inoperative as a bar to federal action. In so deciding, the Court held that while there might be a difference between 'legislation" and "regulation," nothing in the act supported the particular distinction which the FTC attempted to draw. *Cf.* Kenney, *Why This Jubilation at Supreme Court Decision on A & H Insurance?*, 69 U.S. Investor 51 (1958).

[13]See Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. § 5b (1952); 52 Stat. 1004 as amended, 49 U.S.C. § 492 (1952).

plicable in full . . . except to the extent that the States have assumed the responsibility and are effectively performing that responsibility for the regulation . . . Congress did not intend to permit private price fixing." 13 Public Papers and Addresses of Franklin Delano Roosevelt 587 (Rosenman ed. 1950).

[14]24 Stat. 380, as amended, 49 U.S.C. § 5b (1952). See also Report of the Attorney General's National Committee To Study the Antitrust Laws ch. VI (1955).

[15]26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).

[16]For a classic statement of the characteristics of the insurance industry making unlimited competition undesirable, see *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389 (1914). See also summary by Stelzer, *supra* note 3, at 141 and Cowee & Center, Federal Regulation of Insurance 7, 72-73 (1949).

[17]The different legal and economic conditions under which the life insurance industry operates have led the authors to exclude it from consideration in this Article.

ance between undue repression of nascent competitive individualism on the one hand and encouragement of cutthroat competition on the other.

III. The Effectiveness of State Regulation

A. *The Legislative Pattern*

It should be noted that the McCarran Act, as Public Law 15 is known, sets forth no precise standards for state regulation. For instance, the act does not even mention rating bureaus. It was left to the National Association of Insurance Commissioners, together with the All-Industry Committee,[18] to draft model bills which would indicate the proper future course for state regulation.

The stated purpose of the model rate regulatory laws was to ensure that rates would not be "excessive, inadequate, or unfairly discriminatory," and, at the same time, to authorize and regulate rating bureaus without discouraging competition.[19] In order to reconcile the official recognition of the role of the rating bureaus with the avowed purpose of preserving some measure of rate competition, independent filings and deviations from bureau rates and classifications were expressly permitted.[20]

While many of the model laws were passed in virtually all the states[21] they were adopted with varying degrees of exactitude, so that uniformity does not prevail. Further, since neither the model laws nor the statues adopted set out specific standards for determining whether a rate is "excessive, inadequate, or unfairly discriminatory," the possibility, even the likelihood, exists that insurance commissioners and state courts may arrive at nonuniform, even conflicting, interpretations of the statutes, whether as applied to rates arrived at by the bureaus or as applied to particular deviations from them.

Clearly, an examination of the functioning of regulation under the new legislation is necessary to determine not only whether the principles of the model laws themselves have been upheld but whether the sum total of this regulatory experience approaches the effective regulation envisaged by Public Law 15.[22] While it would be

[18]For a list of members see Stelzer, *supra* note 3, at 147.

[19]Proposed Casualty and Surety Rate Regulatory Bill; and Proposed Fire, Marine and Inland Marine Rate Regulatory Bill, as cited in The Legislative Record, Feb. 5, 1947 and Dec. 16, 1946, respectively: "Section 1—Purpose of Act. The purpose of this Act is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate co-operative action among insurers in rate making and in other matters within the scope of this Act. Nothing in this Act is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This Act shall be liberally interpreted to carry into effect the provisions of this Section."

[20]Proposed Fire, Marine and Inland Marine Rate Regulatory Bill, *supra* note 19, § 7: "[A]ny insurer may make written application to the [commissioner] for permission to file a deviation from the class rates, schedules, rating plans or rules . . . The [commissioner]shall issue an order permitting the deviation for such insurer to be filed if he finds it to be justified . . ."

Proposed Casualty and Surety Rate Regulatory Bill, *supra* note 19, § 7: "Every member of or subscriber to a rating organization . . . may make application to the [commissioner] for permission to file a uniform percentage decrease or increase to be applied to the premiums produced by the rating system so filed for a kind of insurance or for a class of insurance which is found by the [commissioner] to be a proper rating unit . . . , or for a subdivision of a kind of insurance (1) comprised of a group of manual classifications which is treated as a separate unit for rate making purposes, or (2) for which separate expense provisions are included in the filings of the rating organization."

[21]As of November 19, 1957, 26 states had adopted the NAIC Rules Governing Advertising of Accident and Sickness Insurance; 41 states and two territories had enacted the State Fair Trade Practices Act; 45 states and three territories had enacted the Uniform Accident and Sickness Policy Provisions Law; 42 states and Hawaii had adopted the Unauthorized Insurers Service of Process Act. See National Association of Insurance Commissioners, Regulation of Advertising Sub-Committee Report B4-1 (1957).

[22]It is clear that one of the pressures for the adoption of state regulatory laws was the threat of federal intervention, as is evidenced by the concluding section of the Texas act to regulate unfair methods of competition in the insurance industry: "*The fact that the enactment of this Act* will strengthen state regulation of the business of insurance; that substantially the same Act has previously been enacted in thirty-nine states, and that it is *designed to prevent federal regulation* and taxation of the business of insurance *creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended;* and said Rule is hereby suspended and this Act shall take effect and be in force from and after its passage and it is so enacted." (Emphasis added.) See Tex. S. 191, An Act To Amend Article 21.21 of Chapter 21 of the Insurance Code, approved May 8, 1957 (Tex. Ins. Code art 21.21 [Supp. 1958]). The extent to which this motive outweighed a desire for effective regulation is the subject of psycho—rather than economic—analysis. The *impact* of state regulation, however, is susceptible to analysis with the economist's tools, and it is to that which we direct ourselves.

of great assistance to have a detailed analysis of the policies of each state toward competition, and toward rate and classification deviations, a more limited survey can provide a basis for appraisal.

B. *State Regulation in Practice*

1. Restriction of Entry

One balkanizing, anti-competitive and apparently unintended effect of Public Law 15 has been to enable various states to limit the ability of "foreign," *i.e.*, out-of-state, insurance companies to compete for business with "domestic" companies. Thus, Public Law 15 provided justification for a South Carolina statute which levied a tax of three per cent on the premiums written in the state by a "foreign" insurance company. Prudential, a New Jersey corporation which was licensed to do business in South Carolina, argued in the courts that as a consequence of the *South-Eastern Underwriters* decision the taxing power of the state was limited by the commerce clause, and that this tax represented an unconstitutional discrimination against interstate commerce. Although granting that in the absence of the McCarran Act the tax would be unconstitutional, and that all the business done by the insurance company in South Carolina, and thereby affected by the tax, was done "in" or as a part of interstate commerce, the Supreme Court held that the McCarran Act had removed any objections that might be made against the tax under the commerce clause. The court rejected the argument that Congress lacked the constitutional power to authorize state action that would otherwise be prohibited by the commerce clause.[23]

In the years since this decision was handed down, many if not all of the states have levied premium taxes on out-of-state companies. The burdensome nature of these taxes is increased by the fact that they are not uniform as to rate or rate base. Some states allow a deduction for reinsurance paid, for example, whereas others allow a reduction for reinsurance premiums received.[24]

This ability of the McCarran Act to insulate such legislation from attack on constitutional grounds must be counted against it in our attempt to assess its overall impact. There can be no economic justification for such a tax. States desiring to protect their citizens from "foreign" companies domiciled in states where regulation is less stringent can surely find more effective tools than what is, in effect, a discriminatory protective tariff.

2. Rating Bureaus and Deviations

Competition in insurance, as all types of businesses, may take three forms: (1) service, (2) product (policy), and (3) price (premium rates). Conceding the existence, in vigorous degree, of service competition, and not having conducted the elaborate and detailed study of policy provisions necessary to reach significant conclusions concerning the extent of competition in liberalization of policy forms, we confine ourselves here to an assessment of price competition. The paramount problem is to discover the impact on price competition of state laws and their administration; the task is to determine whether, contrary to the directives of the statues, competition has been discouraged. We hasten to add that it is not at all clear that the statues were intended to *encourage* competition; they are, rather, elusively vague, explicitly prohibiting neither competition nor rate uniformity.[25]

The extent of price competition in the insurance industry may, for instant purposes, be inferred in large measure from data on trends in the number of independent filings and/or deviations. Under the provisions of most state laws; rating bureaus are required to file all rates and forms with the proper state authorities. After a stipulated waiting period, these rates become effective unless found to be inadequate, excessive, or unfairly discriminatory. Individual companies may make independent filings—an insurer is not required to become either a member of, or a subscriber to, a rating bureau—or may file deviations, which are to be approved if they meet the same standards of adequacy, etc., required of bureau rates.[26] The model bills further permitted individual companies to adopt individual systems of expense allocation.[27]

[23] *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

[24] Mehr & Cammack, Principles of Insurance 836 (1957).

[25] *Cf.* note 19 *supra*.

[26] Stelzer, *supra* note 3, at 147.

[27] Proposed Casualty and Surety Rate Regulatory Bill, *supra* note 19, § 3 (a) (2) and Proposed Fire, Marine and Inland Marine Rate Regulatory Bill, *supra* note 19, § 3 (a) (3). See also Kulp, *The Rate Making Process in Property and Casualty Insurance—Goals, Techniques, and Limits*, 15 Law & Contemp. Prob. 513 (1950); Murphy, *Time Runs Out*, 8 Casualty and Surety J. 51 (1947).

The extent and intensity of intercompany rate competition in the various states is a function of several factors: (1) the number of insurance companies that desire to determine their own rates, (2) the provisions of the particular state statues, (3) the regulations and orders of the insurance commissioner issued pursuant to his interpretation of the statutes, (4) the courts' interpretation of the statutes, and (5) the extent and degree of the bureaus' opposition to such independent action.

Data now available indicate an increasing tendency in several states to break way from rating bureau domination. In response to a questionnaire mailed by one of the authors to the state insurance commissioners early in 1955, twenty of the twenty-three respondents providing usable answers indicated that they discerned no tendency for the number of independent rate filings (or deviations) to decline since the passage in their states of laws approximating the model rate regulatory bills.[28] In an attempt to elicit further and more current information on this point, the authors recently circulated another questionnaire to the commissioners. Although response was far from complete, the results are significant. In answer to a question regarding the trend of individual rate filings since 1954, thirteen respondents noted an increase in independent filings and deviations, and six reported no change. (One respondent reported increased independent filings in the casualty and fire fields, and a decrease in the number of such filings in the inland insurance line.)

That the provisions of the statutes and the attitude of the insurance commissioners are of the utmost importance in determining the degree of competition in the industry cannot be doubted. Nor can wide differences in philosophies and policies be denied. Generally, three fairly distinct approaches are discernible: an attempt to maximize and widen the scope of permissible competition, within a framework of regulation; an attempt to limit rate competition to some minimal amount; an attempt to impose clear-cut utility-type rate regulation, with the state commission promulgating rates and permitting no deviation.

New Jersey apparently provides an example of the first type of approach. Its insurance commissioner recently stated—in the course of approving a request of the Merchants Indemnity Corporation of New York for permission to write fire and extended coverage at fifteen per cent below the rates of the Fire Insurance Rating Bureau—that, in his view, "the entire philosophy of the rating laws leans in favor of price competition in this State."[29]

In other states, the emphasis on uniformity of rates and policies outweighs any desire to stimulate competition. Thus, the insurance department of Kentucky has sponsored three bills designed to restrict filings of deviations; the bills have met with bitter opposition from the independent companies.

> "The bills in question would . . . authorize [the commissioner] to adopt uniform forms for any kind of insurance; prevent a company from filing rate schedules or rating plans made by a rating organization of which the company is not a member or subscriber; and prohibit companies . . . from filing rates made by another insurer."[30]

Commissioner Thurman stated that the insurance department needs ample authority to control forms and rates or there would be no intelligent way to find out whether premiums are excessive or inadequate. He further pointed out that a standard policy for fire insurance has been adopted in most states, and that several states, including Massachusetts, Texas and Virginia, have adopted a standard automobile policy.[31]

Finally, Texas provides an example of state imposed rate-setting. Not only has that state adopted a standard automobile policy, but the legislature has given the Board of Insurance Commissioners exclusive power to *promulgate* and fix reasonable and adequate automobile insurance rates. Companies may write fire insurance at lower than promulgated rates upon a showing that the resulting premiums are adequate, and that the reduced rates apply equally to all risks of the same character in the same community.[32] For casualty insurance, the board can make or approve

[28] Stelzer, *supra* note 3, at 151.

[29] Journal of Commerce, Jan. 10, 1958, p. 4.

[30] The National Underwriter, March 7, 1958, p. 4 (fire and casualty ed.).

[31] *Id.* at 29.

[32] See 1 National Board of Fire Underwriters, Committee on Laws, Compilation of Rate Regulatory Laws, citing Tex. Rating Laws, ch. 5, art. 5.26; Mehr & Cammack, *op. cit. supra* note 24, at 822-23.

premium rating plans designed to encourage the prevention of accidents, recognize the peculiar hazards of individual risks, and give due consideration to interstate as well as intrastate experience.[33] In addition to this broad and general delegation of power, it is instructive to note that, for casualty insurance, the Texas statutes contain no section on deviations. "Texas . . . has a single rating law for the fixing of casualty insurance rates. It does not permit the fixing of casualty rates on a flexible basis."[34]

In addition to setting rates on automobile and casualty insurance, it appears that the Texas board also fixes rates on credit insurance. The Texas Consumers Credit Insurers Association has objected to the action of the Board of Insurance, and has charged that the setting of maximum rates is arbitrary, that there is no statutory authority for limiting types of coverage to the four forms prescribed by the board, and that the fixing of maximum commissions is a "new and nebulous field" for the board.[35] Regardless of the validity of these objections, it is clear that regulation in Texas has gone beyond the mere approval or disapproval by the board of the practices, schedules and rates of the insurance companies.

Because Texas-type regulation has—fortunately, in our view—not become widespread, we shall confine our attention to those forces and policies which affect the breadth of the area within which competition, *i.e.*, independence and deviation, is permitted to operate.

In many states substantial roadblocks have been placed in the path of deviators (or more accurately, "would-be" deviators) by the activities of the rating bureaus. The model laws provided for the intervention of the bureaus in opposition to independent filing[36] and the bureaus have certainly taken full advantage of that provision. The long harassment by the bureaus of the Insurance Company of North America is a case in point. A recent decision of the Supreme Court of Arizona,[37] relating to the right of partial subscribership, is pertinent here as an illustration of an instance in which rating bureaus and insurance commissioners have attempted—in this case unsuccessfully—to enforce rate uniformity in the insurance industry.

The right of partial subscribership, guaranteed in the model bills, is important to a company that has sufficient loss experience on some types of insurance to sustain an independent filing but does not have the necessary data on all types of insurance to make the services of the bureau completely unnecessary to it. Without the right to partial subscribership, a company to whom *some* of the information collected by the bureau is indispensable must either use bureau rates on *all* types of insurance, or simply file deviations from some of those rates. As many states require deviations to be refiled each year, the deviation procedure is, at the least, cumbersome. Hence, partial subscribership is a right important to companies driving toward more independent rate structures.

The facts of the Arizona case were as follows. The North American Companies notified the Pacific Fire Rating Bureau of the termination of their subscribership to the rating services of that bureau for "dwelling classes"; the notice of termination stated that the insurance companies desired, however, to retain subscribership for the remaining services of PFRB. The bureau, after determining that its by-laws and constitution would not allow it to take disciplinary measures against the companies, amended its constitution to severely limit the right of partial subscribership. This rule[38] was approved by the director of

[33]Texas Laws, 1953, ch. 30, reproduced in 2 National Board of Fire Underwriters, Committee on Laws, Compilation of Rate Regulatory Laws.

[34]Secrest, *Toward a Flexible Future—The Policyholder's Stake*, in Proceedings, 13th Annual Meeting of the National Association of Independent Insurers 26 (Chicago 1957). (Hereinafter cited as Proceedings.)

[35]Journal of Commerce, Feb. 20, 1958, p. 5, col. 3.

[36]Proposed Fire, Marine and Inland Marine Regulatory Bill, *supra* note 19, § 5 (d); Proposed Casualty and Surety Rate Regulatory Bill, *supra* note 19, § 5 (d).

[37]*Pacific Fire Rating Bureau v. Insurance Co. of No. America*, 83 Ariz. 369, 321 P. 2d 1030 (1958).

[38]Rule VII, as cited in the opinion, *supra* note 37, at 372, 321 P. 2d at 1032: "1. Partial services for a particular State or States shall be available to a subscriber . . . in the following cases only: (a) Where the subscriber limits its writings in the State or States covered by the application to the kind of insurance, subdivision or class of risk, or the part or combination thereof, for which such partial services are requested. (b) Where the subscriber desires to utilize the services of the Bureau in a particular State or States for all kinds of insurance and subdivisions or classes of risk for which the Bureau promulgates rates and classifications except in a limited specialty field or fields designated in the application for partial subscribership and approved by the Governing Committee. . . ."

insurance. The trial court held for the rating bureau, but the Supreme Court of Arizona reversed that decision and stated that rule vii "obviously precludes freedom of rate competition that results from partial subscribership. While the director may, under the statute, approve reasonable rules and regulations he cannot make or approve a rule, as here, that would conflict with the true meaning of the statute."[39]

That it took a long legal battle to win a point which the model laws apparently made obvious cannot be ignored, and since most states require annual rejustification of deviations, such struggles over independent filings become even more important. Nevertheless, in this case at any rate, the battle was decided in favor of an expansion of the area of permitted rate rivalry.

Another problem facing potential deviators stems from the fact, cited above,[40] that the statutes do not set out specific standards by which to determine whether or not a rate is "excessive, inadequate or unfairly discriminatory." One of the problems intertwined with this lack of a clear standard is: On the basis of what statistics should such a judgment of reasonableness of rates be made? This problem appears to arise only in connection with deviations and independent filings, for the approval (or disapproval) of bureau rates is predicated on the loss and expense experience data collected by the bureau from its members and subscribers. But in the case of individual filings, the insurance commissioner is faced with a dilemma. Should he place primary reliance on the loss experience of the insurer seeking approval of his individual filing? Should he place primary emphasis on the loss experience of all companies operating in the state? Those operating outside the state? Or should a deviation or independent filing only be allowed on the basis of a difference in expense? The problems of the insurance commissioners are further complicated by the classification of risks, for the commissioners are charged with ensuring that there shall be no discrimination—that is, the same rates must be charged for identical risks. The practices in the states regarding justification of deviations and independent filings have varied widely. A few examples will serve to underscore this diversity.

At the end of 1957, the Virginia Supreme Court upheld an order of the State Corporation Commission forbidding Allstate Insurance Company to subdivide automobile collision classes beyond the subdivisions approved by the commission for the Virginia Insurance Rating Bureau.[41] Allstate held that its own experience indicated that cars used for pleasure driving were less likely to be involved in accidents than were cars used daily for business. The rating bureau, however, did not employ any such subgrouping in its classification and rate schedules. The commission denied Allstate's collision deviation, based on this sub-classification, on the grounds that all companies should be required to use the same general classification, and that Allstate's plan was unsound as it was based only on its own experience.

Logical questions to ask in regard to this decision are: As the rating bureau did not use this sub-classification, where and how was Allstate to obtain data to support its case if its own experience was insufficient proof? Why was its own experience an unsound basis for the sub-classification sought? Was it unsound solely because it differed from the experience of rating bureau members?

From the point of view of public interest, it should be pointed out that if there was or is a significant difference in the loss experience of collision insurance, as Allstate contended, depending on whether the automobile was operated for business or pleasure, then the cost of collisions is being borne disproportionately by the automobile operators who fall into the classification of those less prone to accidents.

An application by the Insurance Company of North America for a ten per cent deviation from filed fire insurance rates in Virginia met a similar fate.[42] In this case, however, the basis for the dismissal was the fact that the company's expenses exceeded the expenses permitted by the commission's formula for a deviation of ten per cent; and the commission would not

[39] *Pacific Fire Rating Bureau v. Insurance Co. of Nø. America*, 83 Ariz. 369, 375, 321 P. 2d 1030, 1034 (1958).

[40] See text, *supra*.

[41] *Allstate Ins. Co. v. Commonwealth*, 199 Va. 434 100 S.E. 2d 31 (1957), discussed in The National Underwriter, Nov. 7, 1957, p. 39 (fire and casualty ed.).

[42] Application of Insurance Co. of No. America and Phila. Fire & Marine Ins. Co. for a Devisation of the Rates of the Va. Ins. Rating Bureau for Fire and Extended Coverage No. 13556 (Va. State Corp. Comm'n, Oct. 4, 1957).

permit the company to absorb the difference by accepting a profit rate below the five per cent required by the formula.

In sharp contrast to the Virginia commission's policy on deviation justification is the policy adopted by the Ohio insurance department. In determining whether or not a rate deviation is justified, the Ohio department recognizes loss experience in the following order of importance:[43]

(1) Ohio loss experience of the insurer;
(2) Ohio loss experience of other insurers or rating bureaus; and
(3) Loss experience of the insurer or other insurers or rating bureaus outside the State.

Thus, primary importance is attached to the experience of the particular insurance company filing the new rate. In addition, it is significant to note that the regulations of the Ohio Department of Insurance contain specific sections informing the insurance companies of the procedures to follow in filing deviations as to rules, coverages and forms.[44]

Something of a middle ground is occupied by the State of North Carolina. There, the insurance commissioner recently allowed Allstate to begin deviating fifteen per cent on fire and extended coverage; the deviation was justified on the basis of the company's record of expense saving. However, Allstate's requests for permission to deviate from the policy forms and manual rules were denied, the commissioner stating that North Carolina's statutes do not provide for such deviation.[45]

IV. Conclusion

The foregoing facts and analysis make possible the following conclusions and recommendations.[46]

First, there seems to be little doubt that the related practices of independent filings and of deviations from bureau rates are becoming increasingly important. The responses to our questionnaire clearly indicate this to be the case, and business journals provide corroborative evidence.[47] There can be no denying, of course, that the path of the independent or the deviator is not any easy one. An executive of one company has described the experience of independent companies in the following picturesque terms: "The company finds that the rating law in some states is not a road or a highway, but a winding cowpath lined with a forest of pressures and paved with the chuckholes of discouragement, stifling imagination, vision, logic and common sense."[48]

A second conclusion which can be drawn from our study is that there is considerable interstate variation in treatment of deviations and independent filings.[49] In this area, with the National Association of Insurance Commissioners or some industry group as the instrument, a drive towards

[43]Ohio Dep't of Ins. Rating Section, Gen. Bull. No. 26, Filing Requirements—Rates, Rules and Coverages § II, at 8 (Jan. 17, 1958).

[44]*Id.* at 9, 10.

[45]Journal of Commerce, Nov. 19, 1957, p. 8, col. 2.

[46]The perfunctory nature of the annual reports of the commissioners and the fact that their decisions are not collected by a reporting service, nor, even, in most instances, made available even in mimeographed form, has made it difficult to achieve complete coverage. The Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary is currently investigating the effectiveness of state regulation under Public Law 15. See remarks of Senator Kefauver, 104 Cong. Rec. 1491 (1958), and speech of Donald McHugh as reported in N. Y. Times, May 7, 1958, p. 58, col. 1. Hearings on airline insurance completed in the summer of 1958 indicated, according to Senator O'Mahoney, that "certain segments of the insurance business operate in a supervisory vacuum." He thereupon turned over to the Antitrust Division the accumulated data. The National Underwriter, Oct. 11, 1958, p. 1. In October 1958, the committee's staff sent a questionnaire, the first of a series, to the state commissioners, calling for detailed information on their staff and departmental organization, licensing and examination policies and procedures, and any actions taken against restraints of trade. The Eastern Underwriter, Oct. 17, 1958, p. 5. Although the inquiry may, as it proceeds, provide additional proof that regulation by fifty-one commissioners, many with inadequate staffs, results in perfunctory, inflexible and inconsistent rate review, its results are unlikely to require substantial modification of our conclusions regarding treatment of deviations and independent filings.

[47]See, *e.g.*, *Price Competition in Fire Insurance*, Bus. Week, May 28, 1949, p. 24.

[48]Edward S. McMahon, Vice President, Wabash Fire and Casualty Co., Proceedings at 110; see Kenney, *Rate Deviation Becomes Whipping Boy of Reactionaries in Insurance Industry*, 58 U.S. Investor 23 (1957).

[49]There is, of course, wide variation also in the vigor an intensity with which state commissioners review bureau rates. The Wisconsin commissioner, for instance, on assuming office in November 1955, after an extensive review of fire insurance rates submitted by the Wisconsin bureau, disapproved them all and set a maximum 2.5% profit factor, cutting the suggested National Association of Insurance Commissioners' profit in half. This action was exceptional. See Kenney, *Insurance Commissioners Had Better Heed Wisconsin Supreme Court Decision*, 69 U.S. Investor 35 (1958).

greater uniformity seems in order. It is to be hoped that the NAIC will reach a determination, using standards as liberal as possible consonant with safety, regarding the extent to which individual company experience is acceptable in support of a deviation. Where such single firm data do not suffice—and it is our view that statistical techniques in the areas of sampling, etc., are now sufficiently refined to permit of a fairly precise determination of the reliability of such data — bureaus should be compelled to provide, at reasonable fees, data for any sub-classification which a company contends is worthy of consideration. The commissioner might, of course, decide that such a sub-group is not a useful one for purposes of rate-making but such a decision will at least have been based on s o m e t h i n g more than whim or inertia. This procedure may, we admit, require an improvement — qualitative and quantitative—in the staffs of the state commissions. Such, however, is the price of effective regulation.

A third conclusion which one can draw from the foregoing review is that the path of the deviator is not only difficult, but *unnecessarily* so.[50] Measures to smooth that path should be given every consideration—within the framework of regulation based on statistically supported rate filings. Of extreme importance would be the adoption of some approach which would eliminate the necessity of annual justification of deviations from bureau rates. If a deviation is based on a time period long enough to establish the typical nature of the data on which the deviation is based, subsequent annual rejustification would seem unnecessary.

A fourth conclusion can be adduced from the above-cited information concerning the current functioning of the insurance regulatory process. One would expect that the increased pressure on insurers to justify their rates to state authorities would result in an improved rate structure. Such, in fact, seems to be the case. Improved classifications of fire occupancy hazards, uniform classification of expenses, formulae for adjusting rates more equitably on a class-by-class basis, and experience rating plans for multiple-location risks have all been introduced.[51] More specifically, there are now 110 classes of fire risks as compared with twenty-six before 1944; most companies now tend to allocate expenses to the class of risk for which the costs are incurred, whereas no detailed or uniform breakdown of expense figures was compiled before 1949; and the recommended maximum permissible fire underwriting profit adopted at the Commissioners' convention has been reduced from eight per cent to six per cent.[52]

Finally, the experience of well over a decade with completely rewritten and revised state regulation of insurance suggests certain broader hypotheses regarding the use of conditional and partial exemptions from the antitrust laws. In the first place, given both the indifference with which state regulatory policy had viewed monopolistic rate-fixing prior to 1944 and the clearly interstate nature of the business, there was ample justification for the Department of Justice to assert jurisdiction over the industry. At this point, two alternative courses of action were open. The industry could have been policed by the antitrust division, with rating bureaus eventually reduced to an informational function; this would undoubtedly have sufficed to give the prevailing system of state rate regulation its quietus. Rates might then have been set by some variety of price leadership, with an informal, more or less precise, industry formula designed to fall short of volunerable conscious parallelism.[53] Price competition would have been freer than before, but Congress apparently felt that a threat to private and public welfare would still lurk in the potential—faint though it would be—of unrestrained price competition. Hence the second alternative appeared the more reasonable: to strengthen state regulation, infusing it with greater sensitivity to the degree of competition that is necessary to prevent exploitation, while at the same time reserving partial jurisdiction to fed-

[50]The attitude of the industry toward deviation was indicated by the reaction of Albert J. Smith, President of U. S. Aviation Underwriters, Inc., one of two groups writing hull and liability insurance for airlines, at hearings before the O'Mahoney subcommittee (see note 46 *supra*). According to Mr. Smith, competition was not only a "rat race," it also tended to be "stupid an vicious." See Kenney, *Senate Subcommittee Hearings Point up Valuable Lesson to Insurance Industry*, 69 U.S. Investor 31, 35 (1958).

[51]Marryott, *Mutual Insurance Under Rate Regulation*, 15 Law & Contemp. Prob. 540, 546-47 (1950).

[52]Whitney, *op. cit. supra* note 2.

[53]See Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 66-67, 126-29 (1954); Report, *op. cit. supra* note 14, at 36-42.

eral antitrust. Accepting as reasonable the premise that completely unfettered competition in fire, casualty, and surety insurance rate-making is economically undesirable, the compromise embodied in Public Law 15 is defensible as a program. This is not to deny the existence of clear-cut support for the contention that regulation, as it has been imposed, has tended to make deviation more difficult than it would be *were there no regulation.* But unregulated competition in the sale of insurance is not one of the alternatives open to us. For better or worse, by state, or perhaps in the future by federal agencies,[54] some form of regulation is here to stay.[55] This situation antedated Public Law 15 and would survive its repeal.

Nor does it seem to us that espousal of a series of modifications of the current regulatory procedures—modifications designed to faciliate deviation and independent filings—is inconsistent with the position that unrestrained competition would be unworkable in the lines of insurance here under discussion. An increase in statistically supported nonbureau filings is quite a different thing from unfettered competitive rate-making of the type called for by the Sherman Act. The requirement that companies desiring to meet the lower rates of competitors must also statistically support their reductions ensures, given judicious regulation, that rate-cutting will not reach ruinous proportions. Only by cutting costs or improving experience could a company meet lower rates of a competitor; failing that, it would have to content itself with attempting to provide superior service.

Not to be overlooked in any assessment of the adequacy of the present system of regulation in this industry is the fact that antitrust exemption is only partial. As we pointed out earlier, acts of boycott, intimidation and coercion may still be prosecuted under the provisions of the Sherman Act. All indications are that the Department of Justice is moving vigorously in this area. A consent judgment has been obtained to put a halt to sales of funeral merchandise;[56] and successful suits have been brought against boycotting practices of agents' association.[57] There can be little doubt that the justice department intends to continue its efforts along these lines.[58] Significantly, overt industry support and enforcement of restrictive rules adopted by brokers' associations have been eliminated.[59]

A lesson of the McCarran Act seems to be, therefore, that if antitrust exemptions are to be made available there must be provision for the Department of Justice to move when the regulatory authorities are indifferent to the basic requirements for competition.[60] True, this does not insure continuous supervision of the regulators, but this is too much to ask in our society. The continued threat of possible repeal of the McCarran Act, and of possible antitrust action under it, seem to have sufficed to produce a slow but discernible shift in the industry toward more flexible and independent pricing, and away from a series of undesirable trade practices.

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[54]For an interesting discussion of the likelihood of federal regulation see Kimball & Boyce, The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective, 56 Mich. L. Rev. 545, 576-78 (1958).

[55]One attorney, writing in a somewhat different connection, has stated, "It is useless for those who deplore the growth in the number and authority of administrative bodies to wring their hands over a *feit accompli.*" Miller, *Administrative Law: Must the Angels Weep?*, 62 Dick. L. Rev. 205, 214-15 (1958).

[56]*United States v. Liberty Nat'l Life Ins. Co.*, Civil 7719-S, D. Ala., June 29, 1954.

[57]*United States v. New Orleans Ins. Exch.*, 148 F. Supp. 915 (E.D. La.), *aff'd per curiam*, 355 U.S. 22 (1957); *cf. United States v. Insurance Bd.*, 144 F. Supp. 684 (N.D. Ohio 1956). For a discussion of some of the restrictive rules used by agents' groups before the South-Eastern Underwriters Association decisions see Stelzer, *supra* note 3, at 149; 1948 New York State Joint Legislative Committee on Insurance Rates and Regulations Report 19-20; Butler *Activities of Agents Under the McCarran Act*, 15 Law & Contemp. Prob. 568, 571 (1950).

[58]Address by Victor R. Hansen, "Antitrust and Regulation Problems in Insurance," delivered before the University of Arizona Program on Insurance Regulation, Tucson, Ariz., Jan. 21, 1958.

[59]In March 1950 the National Association of Insurance Agents notified its branches that it would no longer aid in the enforcement of these rules. See Butler, *supra* note 57.

[60]*But cf.* von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, especially 965-66 (1954).

When Is an Insurance Policy "Cancellation" Not a "Cancellation"?—an Exercise in Semantics

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AMONG THE questions included in an application for insurance, one commonly finds an inquiry as to whether any insurer has canceled or refused insurance coverage of the type sought by the applicant within a specified period of time.[1] The policy, when issued, normally incorporates, as representations or warranties[2] of the insured, the answers of the insured to the questions put to him in the application. It is the purpose of this paper to explore briefly the meaning of the words, "canceled" or "cancellation", as used in such insurance questionnaires, with a view to determining whether the answers of the applicants were true or false in various fact situations.[3]

No problem is presented where, pursuant to a power of unilateral cancellation set forth in the insurance policy, the prior insurance carrier has given the insured due notice of cancellation of his policy. If, thereafter, the insured applies for coverage with another company and answers in the negative the inquiry with respect to prior cancellations, his answer is obviously false, and the insurance carrier becomes entitled to avoid the policy on grounds of fraud, or misrepresentation material to the risk.[4] Thus in *Klim v. Howard Johnson et al.*, 16 Ill. App. 2d 484, 148 N. E. 2d 828 (1958), the insured had answered, "no", to the question in his automobile liability insurance application, "has any insurer ever[5] cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household", despite the fact that he had recently received a letter from his prior liability carrier, giving notice of unilateral cancellation of the policy. Needless to say, the Illinois court had no difficulty in permitting the company to avoid the policy *ab initio*, although the company did not discover the fact of the misrepresentation until several months after the insured had had an accident and incurred liability to the plaintiffs. The court defined the term, "canceled" as follows (148 N. E. 2d 828):

> "The courts of this state have construed policies as 'canceled' and the act of the insurance company to be a 'cancellation', when the insurance company sends a written notice, in which it positively and affirmatively indicates to the insured that it is the intention of the company that the policy shall cease to be binding as such upon the expiration of a stipulated number of days from the time when this intention is made known to the insured."[6]

On the reverse side of the coin, it would seem equally clear that where the insured, in pursuance of the authority accorded him under his prior policy, has

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[1]The precise form of the inquiry of course varies from application to application and minor variations in phraseology may make a major difference in result.

[2]The attempt to treat statements of the insured, made in the application, as warranties is often prohibited by statute. See Burns Indiana Stats. Ann. (1952 Repl.) § 39-4206 (5) pertaining to life insurance.

[3]What constitutes a cancellation under various statutes, such as state Workman's Compensation Acts, requiring notice of cancellation to a public authority, is beyond the scope of this paper. See on that subject *Otterbein v. Babor & Comeau Company*, 272 N.Y. 149, 5 N.E. 2d 71 (1936), and annotation, 107 A.L.R. 1514 (1937).

[4]Even an innocent misrepresentation renders the policy voidable, if pertaining to a fact material to the risk. *Allstate Ins. Co. v. Moldenhauer*, 193 F. 2d 663 (7 Cir., 1952) (non-disclosure of prior cancellation held material to risk).

[5]It is interesting to note that this application does not limit its question to any specified period of time. Query whether a compassionate court might not find some excuse for overlooking an ancient and long forgotten cancellation, perhaps on the theory that ancient history is not material to the risk?

[6]Citations include *Burnett v. Illinois Agricultural Mut. Ins. Co.* 318 Ill. App. 629, 48 N.E. 2d 559; *Stryzewski for use of Larsen v. American Motorists Ins. Co.* 286 Ill. App. 613, 3 N.E. 2d 338; *Colonial Assurance Co. v. Nat'l Fire Ins. Co.* 110 Ill. App. 471.

exercised his power of unilateral cancellation of the policy,[7] such a cancellation is *not* within the scope of an inquiry as to prior cancellations by an *insurer*. This holds true, even though it was the prior insurer who ultimately stamped the policy, "canceled", after the insured had so directed it to be canceled.

To illustrate, in *Rabin v. Central Business Men's Association*, 116 Kan. 280, 226 Pac. 764, 38 A.L.R. 26 (1924), the plaintiff-assured, who was suing on a policy of accident insurance, had replied in the negative to the following question in his policy application:

> "Has any life, health, or accident policy issued to you been canceled?"

As a defense to the suit on the policy, the insurer attempted to set up the fact that the answer of the assured was false. It appeared from plaintiff's testimony that he had had three accident policies with another company, but that, being dissatisfied with the manner in which the prior insurer had handled a previous claim, he had taken his previous policies to the office of the company and turned them in for cancellation.

Despite the fact that the prior-cancellations question in the *Rabin* case was not in terms restricted to cancellations by an *insurer*, the Kansas Supreme Court held that the above described transaction constituted a voluntary surrender and not a "cancellation" within the meaning of the question posed. Said the court at 38 A.L.R. pages 27-28:

> "It was of no importance to the company to know whether or not the applicant had voluntarily surrendered a policy, even though, technically it might have been marked 'canceled' for under such circumstances the act would not indicate anything detrimental to the application as a risk." (citing 1 *Corpus Juris* 423).[8]

One can hardly quarrel with the results of the two cases, discussed above. A more difficult situation presents itself, however, in a case where the prior cancellation, though not affected by advance written notice of cancellation from the carrier to the insured in strict conformity with the cancellation clause of the policy, had, nevertheless, been initiated by the insurance carrier, at whose insistence[9] the insured had ultimately been induced to surrender his prior policy for cancellation.

Where the assured had surrendered his prior policy for cancellation in response to an unequivocal command from the insurance company, supported by the implied threat that if he failed to do so, the company would exercise its power of unilateral cancellation, one court at least has held that he could not thereafter truthfully represent that no prior cancellation had taken place. *In Wells v. Great Eastern Casualty Co.*, 40 R.I. 222, 100 Atl. 395 (1917), the assured had signed an accident policy application, containing the following warranty:

> "12. No accident, sickness or life insurance policy issued to me has ever been canceled or renewal refused, except as follows—no exceptions."

This policy had been renewed annually for two successive years, each renewal containing the statement that the warranties set forth in the original policy were also true on the date of renewal.[10] During the second year of renewal it came to the attention of the carrier that pre-existing coverage on the insured had been cancelled before the assured had applied for his present policy. The insurance company promptly sent a registered letter to

[7] A typical cancellation clause, taken from an automobile liability policy, may provide as follows: "Cancellation. This policy may be cancelled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing."

See also Burns Indiana Stats. Ann. (1952 Repl.) § 39-4253 (B) (8) pertaining to cancellation of life, accident and sickness policies.

[8] See also annotation 38 A.L.R. 30 (1925).

[9] The degree of insistence may range from a mere request to a positive command. It may be reinforced with threats, or sweetened with inducements, such as the promise of substitute insurance coverage, of which more hereinafter.

[10] Query as to how strictly the court would have enforced the continuing warranty clause, contained in the renewal, if the undisclosed cancellation had not occurred until after issuance of the original policy? In theory, at least, this should make no difference.

the assured, returning the premiums theretofore paid,[11] declaring the policy void for misrepresentation and breach of warranty, and directing the assured to bring in his policy to be canceled. The assured surrendered the policy which was marked "canceled". Shortly thereafter he died of opium poisoning, which, the court pointed out, had been introduced into his system by unknown means.

Suing on the death benefit clause of the policy, the assured's widow, as beneficiary, sought to avoid the company's misrepresentation defense by arguing that in substance the prior transaction involved a surrender, rather than a cancellation. The court held for the defendant insurance carrier, distinguishing the facts of the case from a surrender situation as follows:

> "The facts in the case at bar are essentially different. It appeared that Maryland Casualty Company desired to terminate the risk, notified Dr. Wells that it had canceled the policy, and directed him to bring to the company his policy be canceled. He complied with said direction, and the policy was canceled. From these facts it clearly appears that the transaction was one of cancellation by the Maryland Casualty Compny, and not a voluntary surrender of the policy by the insured, and that the statement in question made by the insured was willfully untrue". *Wells v. Great Eastern Casualty Co.,* 40 R.I. 222, 100 Atl. 395, 398.

In the *Wells* case, *supra,* the company had flatly demanded the return of the policy. Suppose, however, that instead of commanding surrender, it had merely requested surrender, and the assured had complied without inquiring as to the reasons for the request.

The case of the compliant assured was presented in *Smith v. Dominion of Canada Acci. Ins. Co.,* 36 New Bruns. 300 (1903), a decision, incidentally, cited with approval and distinguished in the *Wells* case. In the *Smith* case the insurance carrier, after compromising a claim made against the company by the assured, advised its agent that it desired to retire from the risk and instructed him to return the assured's policies for cancellation. The agent then went to the assured and asked him if he was willing to give up his policies, to which he assented, apparently without discussion of the company's desire to terminate the risk, or the reasons therefor. This was held by the New Brunswick court to constitute a surrender, and not a cancellation. Said the court,

> "But if a company cancel a policy, as it has a right to do, it is not an unreasonable inference to draw that there is a reason for it which would naturally influence the minds of others in case the same person applied to them for insurance, as to whether they would accept the risk or not. If the defendants in this case attached any importance whatever to the fact that previous insurance effected by the plaintiff had been surrendered, they would have asked for it specifically. In my view, therefore, if these other policies were surrendered, as the jury found they were, and not 'canceled' in the ordinary acceptation of that word when applied to policies, then, I think, there was no breach of warranty."

Would the result have been different in the *Smith* case, *supra,* if it had been shown that the assured *knew* that the company sought to get off the risk and had instructed its agent to pick up the policy for cancellation?[12] There is nothing in the opinion to indicate that the court would have reached a different result under such circumstances. For reasons hereinafter explained, it is submitted that such knowledge, or the absence of such knowledge, on the part of the assured, should be the decisive factor in a situation like that presented in the *Smith* case.

We now consider a case in which the assured obviously knew that his prior insurance carrier had instigated the cancellation of the prior policy. In *General Accident Fire and Life Assurance Corp., Ltd. v. J. Ray Browne, et al.,* 217 F. 2d 418 (7 Cir., 1954) the prior automobile liability insurance carrier had written its agent, advising the agent of certain

[11] In regard to the necessity of returning the premiums, as a condition precedent to an effective cancellation, see annotation 16 A.L.R. 2d 1200 (1951).

[12] In spite of the testimony that the agent did not mention to the assured that the company had sent the agent to pick up the policy, it requires considerable stretching of realities not to infer that the assured must at least have suspected this fact.

information, which it had received, to the effect that its assured had been "ambulance-chasing" for certain personal injury attorneys in his locality, but enjoining the agent to keep the information in strict confidence and not let it get out of his office. "In view of the above," the letter had continued, "we ask your cooperation in returning our policy for cancellation within the next ten days". The letter had closed with a renewed warning to the agent to treat the information about the assured as "highly confidential".

According to the testimony of the agent, he had promptly called on Browne and advised him that the company wanted to pick up his policy for cancellation, in return for which the agent said he would try to replace Browne's insurance with coverage in another company. The agent was agent for a number of companies, including the plaintiff, General Accident. The agent further testified that Browne had made no comment at the time, had not even asked why the company wanted to cancel his policy. A few days later Browne had brought in his policy and delivered it at the office of the agent, who had immediately mailed it back to the prior insurer for "flat cancellation". On receipt of the policy the prior insurer had forthwith stamped it "canceled".

On the same day he had returned the old policy for "flat cancellation", the agent had applied for substitute automobile liability coverage with the plaintiff company. The blanks in the application form had been filled in by the agent or someone in his office. The last item on the application had been as follows:

> "No insurer has canceled any automobile insurance, except....."

In this blank had been written, "No exceptions", and the application had been attached to the new policy issued by plaintiff.

Shortly after issuance of the new policy, Browne had been involved in a serious automobile accident in which he had killed a man and injured the man's wife. In wrongful death and personal injuries actions, brought by the surviving wife, Browne was subsequently held liable.

In the course of investigating the accident, plaintiff, General Accident, had discovered the fact that the prior policy had been canceled, and also discovered why the prior policy had been canceled. The prior carrier's agent, who was also an agent of the plaintiff company,[12] had been most punctilious in carrying out the instructions of the prior carrier not to tell a soul, including the agent's other principals, about Browne's ambulance chasing activities. On learning these facts, the plaintiff company had immediately notified Browne that it regarded the policy as void and of no effect.

While the wrongful death and personal injury suits were pending, plaintiff, General Accident, had brought a declaratory judgment action in federal court, joining, as parties defendant, Browne and the prior insurance carrier, to determine which company, if either, was on the risk at the time of Browne's accident.

One of the principal questions in the case was whether the representation, that "no insurer has canceled any automobile insurance", was true or false.[13] The court, without citation of authority, held that it was true, on the theory that the inquiry looked only to a cancellation by the insurer pursuant to the cancellation clause in the policy. Said the court on this point (217 F. 2d p. 422):

> "The misrepresentations are said to be embodied in the statement that 'no insurer has canceled any automobile insurance—no exceptions', which was, in substance, the same language later written into plaintiff's policy. The evidence shows that this statement was not false. There is no evidence that any insurer had cancelled any automobile insurance policy issued to Browne. His General Casualty policy was surrendered by Browne. To determine what plaintiff had in mind when it used the language above quoted and especially the language 'no insurer has cancelled,' a reference to another provision of plain-

[12]The case makes an interesting "who's whose" in the law of agency, as applied to insurance agents, and raises some interesting questions on the scope of the doctrine of imputed knowledge.

[13]Even though Browne had not signed the insurance application and was not initially responsible for it, it became his representation when the application was incorporated into the policy, by the weight of authority. *Metropolitan Life Ins. Co. v. Alterovitz*, 214 Ind. 186, 14 N.E. 2d 570 (1938); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

tiff's form of policy is helpful. Condition 22 thereof indicates how plaintiff, as the insurer, might effect a cancellation of its own policy, i. e., by mailing to the insured a written notice, stating when thereafter such cancellation should be effective."

Conceding the principle that any reasonable doubt as to the meaning of a provision in an insurance policy must be settled in favor of the insured,[18] it is submitted that the intended meaning of a question such as "no insurer has canceled any automobile insurance", is quite plain. First, it should be noted that the cancellation in *General Accident Fire and Life Assurance Corp., Ltd. v. Browne,* which we have just discussed, is within the literal terms of the above language. It was the insurer, after all, who stamped the policy "canceled".

Secondly, there is nothing in the above question to indicate that its scope was intended to be restricted exclusively to a cancellation effected by the insurer in strict conformance with the cancellation clause of the policy. That conclusion of the court finds no support in the language of the inquiry.

Third, and most important, it should and would be evident to any one that the purpose of any prior-cancellation inquiry is to enable a prospective insurer, which learns that a previous insurer has seen fit to terminate the risk, to investigate the reason therefor, prior to accepting the risk. It imposes no strain upon the intelligence of the applicant to charge him with the further knowledge that the prospective insurer would be no less curious, concerning a cancellation to which the insured had acceded upon request from the prior insurer, than the prospective insurer would be, with respect to a purely unilateral cancellation by a prior insurer. If these facts would be obvious to the applicant, he should not be heard to conceal a prior cancellation (whether by the insurer unilaterally, or by the insurer with the ultimate consent of the insured) in which he knows the prospective insurer would be interested, and then, when the concealment is later discovered, argue the technical refinements of "cancellation" vs. "surrender".

The acid test is, who instigated the transaction which resulted in termination of the prior policy? If the cancellation of the prior policy was initiated and set in motion by the insurance company, then it falls within both the language and the spirit of the prior-cancellations inquiry, whether the insured eventually surrendered his policy or not, and whether the insured gave up his policy with or without a struggle.

In so arguing, ours is not entirely a voice, crying in the wilderness. In *Eddy v. National Union Indemnity Co.,* 78 F. 2d 545 (9 Cir., 1935) the assured had answered, "no exceptions" to the provision in the policy application that "No company has cancelled or refused to issue any kind of automobile insurance for the assured during the past three years, except as follows." In point of fact, the assured had had several prior policies which had been terminated. In no case were the prior policies canceled by the company in accordance with the cancellation clauses. Several of the companies had simply telephoned the insured's broker and instructed him to substitute other coverage on the insured. In one case the prior insurer had contacted the insured's broker and asked him to pick up the policy for cancellation. The Court of Appeals for the Ninth Circuit held that all of these transactions were cancellations by the insurer within the scope of the above prior-cancellations inquiry.

It is respectfully suggested, however, that in view of some of the foregoing decisions, insurance companies would do well to make their inquiries more explicit and less easily avoided. Some such language as the following might help:

> "No insurer has cancelled any prior ..... insurance policy, (nor has any such prior insurance policy been cancelled or otherwise terminated at the instance or upon request of the insurer), except at follows ....."

[18]See *Medford v. Pacific Nat. Fire Ins. Co.,* Oregon, 219 P. 2d 142, 222 P. 2d 407, 16 A.L.R. 2d 1181, 1189 (1950).

State vs. Federal Regulation—Another Milestone*

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The United States Court of Appeals for the Eighth Circuit in the case of *Travelers Health Association, Petitioner v. Federal Trade Commission, Respondent,* 262 F. 2d 241, decided January 13, 1959, opinion by Sanborn, Circuit Judge, concurred in by Judge Johnsen (Vogel, Circuit Judge, dissenting), it was held that the Federal Trade Commission is, and was at all times pertinent to the decision, without authority to regulate the practices of Travelers in advertising and soliciting insurance.

The Attorney General of Nebraska filed a brief amicus curiae in support of Travelers, which was concurred in by the attorneys general of twenty additional states. An amicus curiae brief was also filed in behalf of The Health Insurance Association of America, a trade association comprising more than two hundred sixty companies writing accident and sickness insurance.

Appeal to the court was from a cease and desist order of the commission holding that it had jurisdiction to regulate advertising promotion and sale by direct mail, and that certain of Travelers' practices were false, misleading and deceptive.

Travelers contended before the court that the commission was precluded by the McCarran-Ferguson Act, 15 U.S.C. Sec. 1011-1015, 15 U.S.C.A. Sec. 1011-1015, from regulating the advertising practices of Travelers because its insurance business was subject to state laws "which relate to the regulation * * * of such business"[1]; also that none of the advertising was false, misleading or deceptive.

The case was first argued and submitted to the Eighth Circuit on November 13, 1957. It so happened that on November 12, 1957, the United States Supreme Court (355 U.S. 867), granted certiorari in cases decdied by two other Circuits, being *The American Hospital and Life Insurance Co. v. Federal Trade Commission,* 5 Cir., 243 F. 2d 719, and *National Casualty Company v. Federal Trade Commission,* 6 Cir. 245 F. 2d 883. In both of those cases, the companies did business through licensed agents in various states, so that the direct mail issue was not involved in either of them. Both the Fifth and Sixth Circuits held that the commission was without jurisdiction. On June 30, 1958, the Supreme Court in a per curiam opinion affirmed the judgments in both cases, saying that the McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate" the practices which the Commission had attacked.

Subsequently, the Eighth Circuit directed reargument of the Travelers case which occurred on September 13, 1958.

Judge Sanborn's decision held "the obvious purpose of the McCarran-Ferguson Act was to remove the cloud cast by the case of *U. S. v. South-Eastern Underwriters Association,* 322 U.S. 533, upon the right of the States to continue to regulate and to tax interstate insurance business under their own laws as they had done for some seventy-five years." The court said that the history and effect of the act had already been adequately explained, citing *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 429-431, in which the continued right of the states to tax insurance premium (even in a discriminatory manner) was sustained; *Maryland Casualty Co. v. Cushing,* 347 U.S. 409, 413, in which a point of maritime law was involved; *North Little Rock Transportation Co. Inc. v. Casualty Reciprocal Exchange,* 8 Cir. 181 F. 2d 174, 176, involving premium rates; *American Hospital and National Casualty* cases, *supra,* involving health and accident in-

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*For prior general discussion of this subject, see "Federal Trade Commission Jurisdiction?" by C. C. Fraizer, XXII Insurance Counsel Journal 467, and "Recent Misleading and Deceptive Mail Order Accident and Health Insurance Policies and Advertising" by Charles C. McCarter, XXIII Insurance Counsel Journal 82.

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[1]The McCarran-Ferguson Act provides "continued regulation and taxation by the several States of the business of insurance is in the public interest" and "* * * insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business", and "the Federal Trade Commission Act * * * shall be applicable to * * * insurance to the extent that such business is not regulated by State law."

surance advertising; *Securities & Exchange Commission v. Variable Annuity Life Ins. Co. of America,* D.C. D.C., 155 F. Supp. 521, 527, in which the court held that the Securities and Exchange Commission had no regulatory jurisdiction and that the exclusive jurisdiction to regulate rested in the insurance department, this relating to the rather new type of variable annuity insurance.

At various stages of the pendency of the *Travelers* case in the Eighth Circuit, the commisssion had advocated the existence of dual regulation—both state and federal —to which the court answered that "the Commission is clearly without authority to do any additional or supplemental regulating of petitioner's advertising practices."

The court added that Nebraska law is adequate to enable its insurance department to deal effectively with unfair advertising practices of Travelers or of any other company domiciled in Nebraska. The court says this proposition "cannot be questioned".

Nebraska's Unfair Competition and Trade Practices Act of 1947 (Secs. 44-1501 to 44-1521, Revised Statutes of Nebraska, 1943, Reissue 1952) prohibited improper practices "in this state", and it was amended in 1957 (Secs. 44-1501 et seq., Revised Statutes of Nebraska 1943, 1957 Cumulative Supplement) to specifically provide for the same prohibition "in any other state * * *".

At the time the commission entered its cease and desist order appealed from, the Nebraska act did not expressly authorize the Director of Insurance to deal with unfair practices "in other states" by a company domiciled in Nebraska. The court said this "is of no substantial consequence"; that the validity of the order under review depends upon the law presently applicable, and that a substantial change in applicable law, occurring after entry of an order or judgment which alters the rule governing a case, will ordinarily be given effect on review. The court added that the Nebraska director had "at all times" the power to regulate the practices complained of "in Nebraska and other states". In other words, Judge Sanborn's opinion, although recognizing the 1957 amendment, does not rely upon it.

The opinion recites the fact, which was undisputed in the record, that all of the business of Travelers was done at or from its home office in Omaha, Nebraska; that solicitation material originated and was mailed at Omaha, Nebraska, where applications for insurance were received and where all policies were written and all premiums paid. The court said:

> "With every activity of the petitioner, in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the petitioner's practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law.
>
> In our opinion, there is no controlling distinciton between the instant case and National Casualty Co. and American Hospital and Life Insurance Co. cases. We think that the advertising practices of the petitioner are regulated by State law within the letter and spirit of the McCarran-Ferguson Act, and that the Act has placed such practices beyond the regulatory power of the Commission."

In dissenting, Circuit Judge Vogel said that he did not believe the 1957 amendment to include receptive practices "in any other state" is the kind of regulation by state law Congress had in mind (notwithstanding that the majority opinion specifically indicated it did not rely upon the 1957 amendment). The dissent added that to force citizens of other states to rely upon Nebraska's regulation is impractical and ineffective; that the commission's cease and desist order should have been sustained.

At this writing, it is unknown whether the commission will appeal to the United States Supreme Court.

The decision of the Eighth Circuit is recognized to be of great moment in connection with the general regulation of the insurance industry by the state of domicile in ways reaching far beyond the immediate issues in the *Travelers* case.

Discovery of Policy Limits

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FORCED disclosure of policy limits is of serious concern to those responsible for the defense of third-party liability litigation. Attempts to determine, before judgment, the dollar limits of the defendant's indemnity or liability insurance protection are persistently being made by counsel for bodily-injury claimants. When all investigative efforts to obtain this information are exhausted without success, the sanction of the court is frequently sought by resort to various discovery techniques.[1]

The devices usually brought into play are discovery depositions, written interrogatories and motions for production of documents under the Federal Rules of Civil Procedure and comparable or similar civil practice rules governing actions in state courts, and separate actions under perpetuation of testimony statues or rules.

These efforts have produced diametrically opposite results in the state courts of final resort that have decided the question and raise serious constitutional issues, Doctrinally, the decisions turn on the meaning of "relevancy" under dicovery rules and the determination of whether a third-party claimant, pending the action, has a "discoverable interest" in the defendant's liability insurance contract.

Where state statutes are interpreted as declaring public policy to be that a contract of liability insurance, particularly automobile insurance, evidences a contractual relationship created by statute enuring to the benefit of an injured person, the highest courts of *three* states[2] have held that merely the pendency of an action by an injured person, before judgment, gives such person a discoverable interest in the defendant's liability insurance policy. The courts following this course also tend to ground their holdings on "expediency", the premise being that the purpose of discovery is to effectuate the prompt and just disposition of litigation and that plaintiff's knowledge of the limits of the defendant's insurance coverage will have a substantial effect in accelerating settlements and thus relieve congested courts of the necessity for a great number of jury trials. Constitutionality does not appear to have been raised in any of these three jurisdictions.

Discovery of the existence and amount of insurance has been denied by courts of final resort of *six* jurisdictions,[3] all on the basis that a personal-injury plaintiff has no discoverable interest in the defendant's liability insurance policy prior to judgment. These courts uniformly require relevancy to the subject matter and reject the expediency and discoverable interest arguments. These decisions are bottomed on the discovery rules themselves, which provide that matter to be discoverable must constitute admissible evidence or be reasonably calculated to lead to the discovery of admissible evidence. It is, accordingly, held that the amount of liability insurance coverage, like the amount of defendant's assets and personal wealth, does not constitute evidence admissible upon the trial, and that knowledge of such cannot be said to be reasonably calculated to lead to the discovery of admissible evidence. Possible contravention of constitutional rights is alluded to in some of these decisions.

Applying the "discoverable interest" rule, California has allowed discovery of the policy and its limits in two cases.[4] These decisions do not involve the discovery rules themselves, but involve the use of a statutory procedure for the perpetuation of testimony. In each case, while the personal injury action was pending, the plaintiff under the guise of perpetuating testimony for use in a direct ac-

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[1] Young, *Discovery by Plaintiff of Defendant's Liability Insurance Coverage*, 403 Ins. L.J. 503 (Aug. 1956).
Lavorci, *Disclosure of Insurance Policy Limits*, 415 Ins. L. J. 505 (Aug. 1957).

[2] California, Kentucky and Illinois.

[3] Nevada, Oklahoma, Minnesota, South Dakota, Florida and Arizona. See also *Ruark v. Smith*, (Super. Ct., Del., 1959), 147 A. 2d 514.

[4] *Demaree v. Superior Court, Ventura County*, 10 Cal. 2d 99, 73 P. 2d. 605 (1937).
Superior Insurance Co. v. Superior Court, Los Angeles County, 37 Cal. 2d 749, 235 P. 2d 833 (1951).

tion against the insurance carrier, which the plaintiff alleged he expected to bring after he obtained the judgment he expected to obtain against the defendant, the California Supreme Court held that a sufficient showing had been made to require the disclosure of the policy and its limits. These decisions are based on the statutory right of the judgment creditor in a negligence action to bring a direct action against the insurance carrier to collect the judgment. The court held that the defendant's liability policy evidenced a statutory contractual relationship enuring to the benefit of the injured party and that the very pendency of the action by the injured person gave him a discoverable interest in that policy.

Kentucky[5] has required the disclosure of the limits of the defendant's insurance coverage by use of similar reasoning: that the standard automobile liability policy evidences a contract which enures to the benefit of every person who may be negligently injured by the insured as completely as if such person were named in the policy, and that after judgment and unsatisfied execution, the judgment creditor could in Kentucky bring either an ancillary or an independent action directly against the insurance carrier to collect the judgment. The Kentucky Court of Appeals did concern itself with the relevancy question under a practice rule substantially identical with the federal rule, but held that the question of relevancy is to be more loosely construed upon pre-trial examination than at the trial, and that if the insurance question is relevant to the subject matter after the plaintiff obtains a judgment it is also relevant while the action pends. The court stated that an insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual insured, but is an agreement that embraces those whose person or property may be injured by the negligent act of the insured.

The latest court of final resort to embrace the discoverable interest and expediency doctrine is Illinois. In *Illinois ex rel. Terry v. Fisher*,[6] the Illinois Supreme Court sanctioned pre-trial discovery to ascertain the existence and limits of the defendant's liability insurance under a practice rule slightly different in language than the federal rule and most state rules, allowing discovery to ascertain "any matter, not privileged, relating to the merits of the matter in litigation, whether it relates to the claim or defense of the examining party or of any other party . . .". The court rejected the relevancy requirement (requiring the matter sought to constitute evidence or be reasonably calculated to lead to evidence) and based its decision on a combination of "discoverable interest" and the "expediency" rationale. The opinion of the court appears to put the greater emphasis on expediency, holding that the purpose of discovery is to effectuate the prompt and just disposition of litigation and that a plaintiff's knowledge of the insurance limits will have a substantial effect in achieving this goal. This conclusion is fortified by alluding to certain Illinois statues requiring standard provisions in liability policies affording an injured person a right of direct action against the insurer, after judgment, if execution against the insured is returned unsatisfied, and also noting statutes requiring certain minimum insurance coverages for motor vehicles. The court declared that it was clear that the legislature by these statues had placed liability insurance contracts in a category distinct from the insured's other assets so far as persons injured by the negligent operation of the motor vehicle are concerned and likened the resultant "discoverable interest" to the California decisions[7] where, under similar statutes, liability coverage is considered a contract for the benefit of injured third parties.

Nevada, Oklahoma, Minnesota, South Dakota, Florida and Arizona have emphatically rejected both the discoverable interest and expediency theories and have applied the strict relevancy rule to deny pretrial discovery of the defendant's liability insurance limits.

In a proceeding for the perpetuation of testimony under a Nevada statue, the plaintiff, following the pattern established in the two California cases, sought discovery of the defendant's liability insurance for use in an action he expected to bring against the defendant's insurance carrier to collect the judgment he expected to obtain against the defendant. The Nevada Supreme Court[8] flatly rejected

[5] *Maddox v. Grauman*, 205 Ky. 422, 265 S. W. 2d 939, 41 A.L.R. 2d 964 (1954).

[6] 12 Ill. 2d 231, 145 N.E. 2d 588 (1957).

[7] See note 4.

[8] *State ex rel. Allen v. Second District Court*, 69 Nev. 196, 245 P. 2d 999 (1952).

the reasoning of the California court and held that until judgment was obtained against the defendant in the personal injury action the plaintiff had no discoverable interest in the defendant's insurance coverage.

The Oklahoma Supreme Court in a late 1957 decision[9] likewise specifically rejected the California decisions and refused insurance limits discovery in a malpractice matter where the personal injury plaintiff brought a separate action against the doctor and the insurer for the perpetuation of evidence for use in the action the plaintiff expected to bring against the insurer to collect the expected judgment against the doctor.

The leading case on the subject is the 1955 decision of the Supreme Court of Minnesota in *Jeppeson v. Swanson.*[10] There the plaintiff sought an order permitting inspection of the defendant's liability insurance policy stating that he needed the information to properly evaluate the case for settlement or trial. The Minnesota practice rule for production of documents was identical with the federal rule, and the court recognized that within the scope in which the discovery rules operate they should be liberally construed so as to effectuate the purpose for which they were adopted. However, the court held there must be some boundary limitation beyond which the courts should not go. The Minnesota Supreme Court specifically rejected the Kentucky and California holdings, even though Minnesota has a statue which permits direct action against an insurer after execution is returned unsatisfied. The court stated that the Minnesota statute was more limited than the California statute and was intended to protect a judgment creditor only in case of the insolvency of a judgment debtor; that if the judgment debtor is able to respond, the Minnesota statute gave the judgment creditor no right to proceed against the insurer, contractual or otherwise, and that the right to proceed against the insurance company arises only by virtue of the statute which declares that the insurance policy is deemed to have granted such right. The court held that this right to proceed against the insurance carrier being established by statute, the court had no right to extend it beyond its terms, and that the plaintiff, prior to judgment, therefore, had no discoverable interest in the defendant's insurance coverage.

In the *Jeppeson* case, the court rejected the expediency argument, holding that if the amount of insurance is discoverable, there is no reason why the extent of all other of the defendant's property and assets is not discoverable; that the word "determination" refers to the disposition of the action in some manner over which the court has control and that the court obviously does not control a settlement. The court stated that there must be some connection between the information sought and the action itself before such information becomes discoverable and that liberal construction of the discovery rules does not mean that information should be discoverable which is desired only for the purpose of placing one party in a more strategic position than he otherwise would be, by acquiring information having nothing to do with the merits of the action, and added:

> "Under the guise of liberal construction, we should not emasculate the rules by permitting something which never was intended or is not within the declared objects for which they were adopted. Neither should expedience or the desire to dispose of lawsuits without trial, however desirable that may be from the standpoint of relieving congested calendars, be permitted to cause us to lose sight of the limitations of the discovery rules or the boundaries beyond which we should not go. If, perchance, we have the power under the enabling act to extend the discovery rules to permit discovery of information desired for the sole purpose of encouraging or assisting in negotiations for settlement of tort claims, it would be far better to amend the rules so as to state what may and what may not be done in that field than to stretch the present discovery rules so as to accomplish something which the language of the rules does not permit."

This Minnesota decision, following the rejection of the discoverable interest and expediency arguments by the Nevada Supreme Court, firmly established the requirement of relevancy under discovery rules identical with the federal rules.

The question next came before the Su-

[9] *Peters v. Webb*, 316 P. 2d 170 (Okla. 1957).
[10] 68 N. W. 2d 649 (Minn. 1955).

preme Court of South Dakota[11] under a discovery rule copied from the federal rules prior to the liberalizing amendment of the federal rules (the 1946 amendment providing that it is not ground for objection that testimony sought by discovery will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence). The court referred to federal decisions that discovery under Federal Rule 34 prior to the amendment may be had only in respect to a document which constitutes admissible evidence and may not be extended to documents which may furnish leads for obtaining evidence, and held that to be the proper construction of the South Dakota discovery rule. In this case there is a strong indication that even with the amendment to the Federal rule, the result would have been the same as the only change liberalizing the rule is that the matter sought by discovery is extended to testimony reasonably calculated to lead to the discovery of admissible evidence. The South Dakota Supreme Court specifically rejected the California and Kentucky holdings, and reversed the trial court's order requiring the defendant to produce a copy of his insurance policy for inspection by the plaintiff.

The Supreme Court of Florida in October of 1957 in *Brooks v. Owens*[12] carefully analyzed all previous decisions in this field and adopted the view that the limits of liability insurance of a policy covering an automobile of a defendant are not proper matters of discovery under Florida discovery rules identical with the federal rules. The Florida court considered the Kentucky and California decisions, specifically rejected the expediency argument, and held that the plaintiff prior to judgment has no discoverable interest in the defendant's insurance coverage. The court cited with approval the Minnesota decision in the *Jeppeson* case and held that the limits of insurance coverage by a defendant are not relevant to either the issue of liability or the issue of damages; that under the discovery rules matter to be discoverable must constitute admissible evidence or be reasonably calculated to lead to the discovery of admissible evidence.

In the Florida case, an action involving injuries for an intersection automobile collision, the defendant had on deposition refused to answer as to the dollar limits of his liability insurance. The plaintiff moved the court to require the defendant to answer the question. This was opposed on the ground that such disclosure would deprive the defendant of liberty and property rights without due process of law and deny him other constitutional rights under the federal and state constitutions; subject him to oppression and embarrassment; that the question was propounded in bad faith; that the sole purpose of the question was to enable the plaintiff to make a demand for settlement within the policy limits and thereby put pressure upon the defendant to require settlement by his insurance carrier within such limits. It was also contended that good cause was not shown for the discovery of the information sought and that the matter was not relevant to any issue. The trial court ordered the defendant to disclose to the plaintiff or his counsel the policy limits of his liability insurance.

The Florida Supreme Court held that the basic concept of our judicial system is to insure all an entry into the courts for the purpose of (1) proving liability for an injury and (2) proving damages occasioned thereby, and that the limits of insurance carried by a defendant are not relevant to either of those basic purposes.

The Florida court followed the *Jeppeson* decision in rejecting the plaintiff's contention that discovery rules are designed for speedy determination of cases and that settlement in itself is a determination, adopting the view of the Minnesota Supreme Court that the word "determination" refers to the disposition of the action in some manner over which the court has control and that the court obviously has no control of settlements.

The latest decision of a state court of last resort refusing disclosure of policy limits is the decision of the Supreme Court of Arizona filed July 2, 1958, in the case of *DiPietruntonio v. Superior Court Maricopa County*[13]. Under Rule 33 of the Arizona Rules of Civil Procedure (identical with Federal Rule 33), the trial court required the defendant to answer interrogatories concerning the name of his insurance carrier and the limits of coverage. The Arizona Supreme Court granted a perman-

[11] *Bean v. Best*, 80 N.W. 2d 565 (S. D. 1957).
[12] 97 So. 2d 693 (Fla. 1957).
[13] Arizona Supreme Court, Opinion No. 6676 filed July 2, 1958 (not yet reported).

ent writ of prohibition as the proper remedy because the trial court was without lawful authority to enter such an order. The court reviewed virtually the entire field on the subject, specifically rejected the reasoning of the California court as well as the recent Illinois Supreme Court decision in *People v. Fisher, supra,* and held that under Rule 33, and the limitations of Rule 26 (b), the discoverability of matter was limited to that which is relevant to the subject matter involved in the action either for use at the trial or to lead to information for use at the trial.

This question of the disclosure of policy limits does not appear to have been decided by any Federal Circuit Court of Appeals. There are a number of Federal District Court cases on this and related subjects involving relevancy under the federal discovery rules, the great majority of which deny discovery of the defendant's insurance limits. It is interesting to note that after the decision of the Illinois Supreme Court in *People v. Fisher, supra,* granting such discovery, the United States District Court for the Eastern District of Illinois in January of 1958, in the case of *Gallimore v. Dye,*[14] and the United States District Court for the Southern District of Illinois (*Roembke v. Wisdom,* June 19, 1958, not yet reported) denied discovery of the defendant's insurance coverage, both decisions emphasizing that under the federal rules a deponent may be examined only regarding information either for use at the trial or reasonably calculated to lead to the discovery of admissible evidence.

In the *Gallimore* case the trial judge reviewed virtually the entire field on this subject but significantly did not mention the contrary holding of the Illinois Supreme Court in the *Fisher* case, which had become final a scant two months previously. The court stated that under Illinois law, which was the controlling substantive law in the case before him, the existence of liability insurance is clearly not evidentiary matter and may not be used at the trial. The court in this opinion gave validity to the constitutional grounds that had been raised by counsel in the Florida case of *Brooks v. Owens, supra,* saying that if the disclosure of insurance policies were permitted, the next step would be the requirement of disclosure of the defendant's other assets giving to all the world knowledge of any defendant's financial condition, thus invading the privacy of the individual before any liability has been determined against him, all of which to the court appeared to be in contravention of the guarantees of the Federal Constitution.

Orgel v. McCurdy[15] is frequently cited, but it is apparent that one of the issues involved in that case was whether the defendant was operating and controlling the automobile involved in the accident. Apparently, the plaintiff sought to establish that fact by showing that the defendant carried liability insurance. The court required disclosure on the ground that the testimony sought may be generally relevant to the issues in the case, one of those issues being operation and control by the defendant.

In *Brackett v. Woodall Food Products, Inc.,*[16] a Federal District Court permitted disclosure of insurance, but in view of a later decision by a different division of the same court in *McNelly v. Perry*[17] *denying* such disclosure, it appears that in the *Brackett* case there was involved the insolvency of one defendant and that proration of insurance might have been an issue among the various claimants, and in addition, punitive damages were sought. In *McNelly v. Perry,* Judge Taylor of the Eastern District of Tennessee specifically held that it had not been shown that the information sought about insurance would be relevant under the federal discovery rules and pointed out the apparent situation in the *Brackett* case distinguishing the two cases.

In *McClure v. Boeger*[18] a Federal District Court in Pennsylvania denied plaintiff's motion for production of defendant's insurance policy holding that whatever advantages the plaintiff might gain were not advantages which had anything to do with the presentation of his case at trial and did not lead to the disclosure of the kind of information which is the objective of discovery procedure.

Similar to *Orgel v. McCurdy,* the Supreme Court of Michigan in 1933[19] allowed discovery of the insurance policy in a case of disputed ownership of a vehicle,

[14] 21 F.R.D. 283 (D.C.E.D. Ill. Jan. 13, 1958).

[15] 8 F.R.D. 585 (D.C.S.D.N.Y. 1948).

[16] 12 F.R.D. 4 (D.C.E.D. Tenn. 1951).

[17] 18 F.R.D. 360 (D.C.E.D. Tenn. 1955).

[18] 105 F. Supp. 612 (D.C.E.D. Pa. 1952).

[19] *Layton v. Cregan & Mallory Co. Inc.,* 263 Mich. 30, 248 N.W. 539 (1933).

the court holding that if the insurance policy showed ownership it would be admissible in evidence for that purpose.

An early decision of the New Jersey Circuit Court for Union County in 1931[20] held that whether the defendant was insured and the amount of insurance were not matters material to the issues so as to require answers to interrogatories; that interrogatories should relate to the case and should be of such character that the responsive answer will constitute relevant and competent evidence for the party propounding interrogatories.

It appears that under the present federal rules, and under state rules sufficiently similar that the information sought by discovery must be relevant to the extent of constituting admissible evidence or being reasonably calculated to lead to admissible evidence, the almost uniform holding is that the amount of defendant's insurance limits is not discoverable. On the other hand, in those states having discovery rules under which relevancy may be more loosely construed; that have statutes interpreted as declaring a policy of liability insurance as evidencing a statutory contractual relationship enuring to the benefit of injured third parties; and where the expediency argument makes an overriding appeal to the court, disclosure of such limits is required.

Certainly the better reasoned view is, as stated in the *Jeppeson* case and approved by the Florida Supreme Court in the *Owens* case, that the court should not under the guise of liberal construction or for expediency emasculate the discovery rules by permitting something which never was intended or which is not within the declared objects for which such rules were adopted. Neither should expediency or the desire to dispose of law suits without trial, however desirable that may be from the standpoint of relieving congested calendars, be permitted to cause the courts to lose sight of the limitations of the discovery rules or the boundaries beyond which the courts should not go.[21]

Of even greater importance than the discovery rules for reasons of expediency are the constitutional violations and invasions inherent in the decisions treating an indemnity contract as different from other assets of the defendant. The constitutional issue should be raised by counsel seeking to forestall forced disclosure of policy limits in every instance that the effort is made, and the constitutional issue should be pressed at all stages of the proceedings.

In *Gallimore v. Dye, supra,* Judge Juergens pointed out that following the disclosure of the insurance policy, the next logical step would be requiring the disclosure of all other assets, which in his opinion would invade the privacy of an individual before any liability is determined against him, and that a more tempting invasion of the right of privacy or violation of the right against unreasonable searches would be difficult to imagine (the objection on this ground should be based on the Fourth Amendment of the United States Constitution relating to unreasonable searches and seizures). The same opinion points out that the reasonable inference from the argument in favor of disclosure is that the defendant can be required to disclose his financial resources prior to an adjudication of his liability, which to the court appeared in contravention of the Fifth Amendment of the Constitution. Also, the Fourteenth Amendment of the Federal Constitution, applying to the states, requires due process and equal protection under state laws, referring to certain provisions of the first ten amendments, and its violation should be assigned in cases involving state court discovery rules.

It is a fundamental rule of construction that a statute or rule will be interpreted and applied, if possible, so as to avoid the necessity of passing upon its constitutionality. So long as the discovery rules are construed and applied within the framework of the Constitution, no constitutional question arises. The constitutional issue is reached when the discovery rules are applied and construed in such a way as to transgress the constitutional guarantees of the Federal Constitution, as well as the same guarantees generally expressed in state constitutions. The application and construction of discovery rules must be kept within constitutional bounds.

[20] *Goheen v. Goheen,* 96 N.J. Misc. 507, 154 A. 393 (1931).

[21] See notes 10 and 12.

Marine Accidents*

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THE WORD "yacht" carries with it a connotation of great wealth—the unobtainable—something beyond the reach of the average man. This well entrenched view existed until about the close of World War II when the onset of exploding populations overcrowded urban communities and inadequate highways caused people to look elsewhere for a medium of travel and recreation. It was only natural that attention was directed to the most available and pleasant substitute for the highway—the sea and other navigable waters and streams.

It was about this time that people began to discover that the awesome, lofty word "yacht" in fact included about everything that floats; or, if one prefers the dignity of a legal interpretation, a yacht is "a vessel larger than a rowboat used for private pleasure."[1]

The medium of water travel aroused the enthusiasm of many for it is boundless in its benefits and endless in its possibilities, and this is natural enough as it is abundant and provides an escape from the pressures of everyday living. It is something which captivates the imagination and enthusiasm of the entire family. It otherwise fills the need for a modified form of adventure limited only by the availability of time and the exercise of reasonable judgment.

Those who have turned to this medium have done so with an almost total enthusiasm. They have become dedicated people. Thousands of such people have availed themselves of the thorough and comprehensive free night school courses given by the United States Power Squadron throughout most of the major cities in the United States covering inter alia, rules of the "road," safety at sea, small boat handling, piloting, navigation, and the like. It is interesting to note that about two-thirds of the people who avail themselves of these courses do not presently own a boat but plan or hope to own one in the near future. Some of these people and others have become members of the United States Coast Guard Auxiliary which, among other things, also provides free courses to the public similar to those offered by the United States Power Squadron but on a less comprehensive basis. The Auxiliary also provides a medium for the boat owner to render service to the Coast Guard by making his boat and himself available for a number of official duties under the supervision and at the expense of the Coast Guard.[2]

Recently favorable financing plans have made ownership of a boat as practical and painless for the average family as the purchase of a second automobile, consequently boats and equipment for them are being purchased about as quickly as they can be manufactured. Indeed, Americans have taken to the sea—thirty-five million of them in 1957 in more than seven million "numbered" vessels,[3] (as compared with less than one hundred thousand in 1918).[4] This does not include the many thousands of small boats used in fresh water lakes, streams, and rivers which do not require "numbering," nor the larger vessels in excess of five net tons which are documented by the United States Bureau of Customs and of which there are some four thousand in the United States.[5] In the first six months of 1958 there were more boats sold in California than automobiles.

The widespread use of boats has required that attention be given to the matter of the liability which can be imposed upon the vessel, its owner, and its

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[1] *Barker v. Inhabitants of Town of Fairhaven*, 265 Mass. 333; 163 N.E. 901.

[2] 14 U.S.C.A. 821-832.

[3] The United States Coast Guard is authorized and responsible for administration of the Motor Boat Act of 1940 (46 U.S.C.A., 288), which requires among other things the inspection and numbering of all vessels more than 16 feet in length used on navigable waters of the United States.

[4] "Yachting", January 1958, p. 115.

[5] H. R. Rep. No. 378, 85th Cong., 1st Sess. 7 (1957).

operator as a result of injuries to persons or damage to property arising from the ownership, maintenance, and operation of such watercraft. Normally this liability and security against it is properly disposed of by the purchase of a specially designed "yacht" policy covering P & I and hull coverages underwritten by a specialty marine insuror. This is particularly true in the case of larger vessels of the type which are customarily left in the water rather than being removed and trailered from place to place or "garaged" on a trailer in some land shelter.

Such marine insurors are naturally skilled in the underwriting and the administration of such business and have available skilled claims people either staffed or of the "independent" variety to adjust losses resulting from the writing of such business. Rates for marine coverages are not controlled or standardized and consequently the business is often "shopped" among carriers for the purpose of obtaining the best rate. Nevertheless this form of coverage is expensive and constitutes one of the principal expenses in boat ownership.

These marine insurors have provided a necessary market for the owners of larger boats but do not satisfy the requirement of the small boat owners substantially for the reason that they have not produced a simplified contract deleting coverage for certain exposures which do not exist insofar as the small boat owner is concerned and scaling down on the premium accordingly to meet the requirements of the average boat owner. There has existed a deep-rooted reluctance on the part of marine insurors to abandon their flair for tradition and precedent and to depart from a form of insurance contract which was fashioned by our forefathers several centuries ago possessing marine terms beyond the comprehension of the average insurance man and the lawyer who is otherwise skilled in the handling of claims emanating from the writing of casualty insurance.

To meet this problem, casualty and multiple line insurors have ventured to amend certain of their liability and property policies on a limited basis to include the liability and property loss exposures resulting from the ownership, maintenance and operation, etc., of watercraft. This venture on the part of casualty and multiple line underwriters is certain to present many problems in time, for most of these carriers now picking up this exposure through the medium of a standard form or a competitive one in lieu thereof for the most part have had little or no experience in the ocean marine field starting with the underwriters and concluding with the adjusters and attorneys who, someplace along the line, will be called upon to adjust losses. Truly, these carriers have undertaken to navigate "uncharted seas." It is probable that many of these carriers do not realize that they have entered the ocean marine field, and it is also probable that the writing of such coverage is beyond the authority of their corporate charters and by-laws, and further, outside the scope of their various state licenses.

It is thus that this material has for its purpose the objective of introducing some of the problems which are presently manifest and which it is anticipated will present themselves in one way or another with some frequency as time goes on. There will also be an attempt to analyze the areas of the law applicable to such problems together with some suggestions relating to the source of such laws. One must understand at the outset that this is not intended to constitute a thorough review of the maritime law, for neither time nor space will permit such, the field of maritime law being highly specialized and vast in nature.

A. The Insurance Policy

Some years ago insurors extended their coverages to include liability arising from the handling of small boats not to exceed 16' in length without motive power, or if equipped with motive power only in the event such power was of the smallest horsepower ratings manufactured. Pressure of competition and adventuresome underwriters have extended this liability over the years to a great extent and perhaps to a degree not contemplated.

Operation of watercraft today is expressed in the Comprehensive General Liability policy as follows:

> This policy does not apply to the ownership, maintenance, operation, use, loading or unloading of . . ..
>
> (2) Watercraft owned by or rented to an insured, while away from the premises, if with inboard power ex-

ceeding 50 horsepower, or if 26 feet or more in over-all length and a sailing vessel, with or without auxiliary power, ...

Similar language is to be found in the Comprehensive Personal Liability policy and the Home Owners Policy—Form B, and in other contracts of insurance frequently by endorsement, and is expressed in many of these forms as follows:

This policy does not apply to the ownership, maintenance, operation, use, loading or unloading of . . . .

(2) watercraft, including sail boats, with inboard motors exceeding 50 horsepower, and sail boats with or without auxiliary power, 26 feet in over-all length, owned by or rented to an insured, while away from the premises, ...

It is to be noted under these policies, the only exclusion as to the size of a watercraft which is covered by the policy is that if with inboard power it does not exceed 50 horsepower. There is no definition of the word "horsepower."

It was traditional in the automotive field that horsepower in the early days was rated on the "indicated horsepower" basis. This tradition was adopted by the American Manufacturers Association in the early days of the development of the automobile combustion engine in England, and continues as an engineering basis for the determination of horsepower, still being used in many states to determine "taxable horsepower." Indicated horsepower is determined by the bore, stroke, mean effective pressure, revolutions per minute, etc., and is expressed in the formula

$N\ B^2/2.5$ = B.H. @ 1000′ per minute of piston speed
N = number of cylinders
B = bore of cylinder
2.5 = constant

It is common practice for the manufacturers of automotive and marine combustion engines to indicate horsepower on the "brake horsepower" basis which is determined by actual test of the motor on a dynamometer which is designed to measure the exact output and torque of the motor. "Brake horsepower" varies with the compression ratio, the porting and relieving of the intake and exhaust manifolds, the extent and nature of the carburetion, timing and the degree of lift in the camshaft, and numerous other considerations. Thus, an engine having certain cubic-inch displacement will always have the same indicated horsepower, but it can develop a brake horsepower many times its indicated horsepower. For example, one of the most popular modern marine engines of the V-8 variety has an advertised horsepower rating of 250, but it only has an indicated horsepower as expressed by the A.M.A. of 46.3. There are literally thousands of "high powered" cruisers of the larger variety in fact equipped only with an engine or engines rated at less than 50 horsepower on the A.M.A. basis. This patent ambiguity is bound to produce difficulties someplace along the line, and it is not presently difficult to anticipate that a court would find that such ambiguity, having been created by the insurors, would be construed against them.

It is to be noted that the watercraft coverage applies to vessels not owned by or rented to an insured while away from the premises. Whether this language will give rise to an attempt on the part of an insured to register with the Coast Guard ownership of the vessel in someone other than himself to come within the coverage provided by this policy, and to thus avoid the purchase of a comparatively expensive marine policy, remains to be seen.

It is apparent that casualty and multiple risk carriers presently following a policy of not underwriting the boating exposure obviously existent in many risks, some known and perhaps many unknown to the insuror, are laying themselves open to substantial exposure for which the premium allocation is nominal. This would seem to call for prompt corrective underwriting procedure if highly unfavorable experience in this class of business is to be avoided. Underwriters presently are turning their attention to these problems for the reasons that not only are they beginning to recognize the existence of a heretofore unmeasured exposure, but also because the marine field in connection with the operation of pleasure craft affords a potential lucrative market if the business is properly written at rates determined on a sound actuarial basis which will afford the insuror a reasonable opportuntiy to make a fair profit.

It is interesting to note that in a coverage dispute between the carrier and the insured, or other persons claiming benefits under the insured's policy, the parties may find themselves under admiralty jurisdiction rather than state court jurisdiction in view of the fact that matters of interpretation of insurance policies touching or concerning marine matters have traditionally been within admiralty jurisdiction.[6] However, in a recent insurance policy case[7] the cause of action was brought in the state court and the court interpreted the issues according to local law. Therefore, there may be some doubt as to what law is applicable.

B. Nature of Maritime Law

Laws relating to liability and loss of property associated with commercial watercraft are among the most venerable and oldest recorded in our civilization. Maritime law, as the word indicates, has to do with controversies, claims, and transactions, whether civil or criminal, which arise from commercial navigation on navigable waters. Our inquiry into the law will be confined only to that law which is applicable to maritime and breach of contract producing injury torts, although there is a vast body of maritime law having to do with martime contracts, liens, maritime insurance, supplies, repairs, etc., which provide a source of great interest but which are disassociated with our problem.

To encourage the investment of capital in the shipping industry and to afford more than ordinary security and protection to seamen so as to attract them into the merchant marine, maritime nations depending upon commerce for the sustaining, maintaining, and protecting of their developing colonial empires began to lay down "ground rules" designed to accomplish these objectives.

England, being one of the nations earliest to develop a body of maritime law and to some extent unparalleled by any other nation in our time in this respect, has contributed much to this body of the law and has greatly influenced our approach to the problems presented in operating a worldwide marine fleet.

Although we are here concerned only with the liability and loss of property associated with the ownership, maintenance, and operation of pleasure watercraft, an abbreviated analysis of the law applicable to ships and shipping is necessary in view of the fact that, although these laws were intended to apply to the operation of commercial watercraft, they nevertheless for the most part also apply to the operation of pleasure craft, there yet having been little or no distinction in these two types of watercraft even though the reasons for the laws in many instances are totally impractical insofar as pleasure craft is concerned. Thus in many areas the law has made no distinction between the 16' outboard pleasure boat and the ocean-going steamship for both are subject to admiralty jurisdiction and thus subject to the same rules of the road and the same substantive principles of law.[8]

C. Courts of Admiralty

Admiralty is a judicial tribunal exercising jurisdiction over all maritime controversies, proceedings, affairs, and transactions, whether civil or criminal, which arise from use or navigation of navigable waters of the United States.[9]

Navigable waters have been variously defined throughout the years, one of the broader definitions being:

> All waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state.[10]

So long as the causes of action are "maritime" in nature, such definition would comprehend causes of action involving pleasure craft.[11]

Under the judicial code (28 U.S.C.A. c.2 para. 41 clause 3 and 28 U.S.C.A. c. 10 para. 371 clauses 3 and 4), the constitutional federal courts are given exclusive jurisdiction over all civil causes in

[6] *Insurance Co. v. Dunham,* 11 Wall. 1 (U.S. 1870).

[7] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310 (1955).

[8] 46 U.S.C.A. 183(a); *Feige v. Hurley,* 89 F. 2d 575 (1937); *Coryells v. Phipps* 317 U.S. 406 (1943).

[9] Benedict Adm. (4th Ed.) Para. 124; 2 Browne C.V.L. & Adm. C. 1.

[10] Gilmore & Black, Admiralty 29 (1957).

[11] *The Trim Too,* 39 F. Supp. 271 (Mass. 1941).

admiralty. The power of Congress to confer this jurisdiction and to create the "admiralty side" of the federal courts emanates from those provisions of the federal Constitution conferring general powers to legislate and from the provisions dealing specifically with admiralty and maritime jurisdiction, and not from the commerce clause.[12]

Admiralty has developed its own body of procedural and substantive law, both common and equity in nature, by an outgrowth of custom and usage, legislation, and legal decision, distinct from that followed by courts of equity or common law.[13]

The admiralty side of the federal courts is controlled exclusively by the laws of Congress and in the absence thereof by the general principles of maritime law as developed in our American maritime system of jurisprudence. While this body of law is similar to principles developed in continental Europe, those principles and the jurisdiction of the continental European courts do not extend to the American courts of admiralty.[14]

Thus it is important to bear in mind that the decisions and usages of foreign courts as to maritime matters are not obligatory upon the admiralty courts of the United States, unless they are entirely consonant with the well-settled opinions of the American and English courts.[15]

State courts have no jurisdiction in admiralty cases except such as are established in pursuance of the third Article of the federal Constitution.[16]

D. Jurisdictional Problems

While it is said that actions purely maritime in nature have but one proper forum; to wit, the admiralty side of the federal court, this does not always follow, depending upon whether the action sounds in rem or in personam. A libel in rem is peculiar to admiralty and must be brought in the federal admiralty forum.[17]

An admiralty libel in personam asserts a personal liability against a person or corporation, having generally the same characteristics as an in personam action in a nonadmiralty court, and thus it can be expected that federal admiralty and state courts will, under certain circumstances, share concurrent jurisdiction.[18]

The defendant of course has the usual power of removal of a case from state court to federal court under certain circumstances, therefore curtailing in some cases the plaintiff's choice of forum.[19] Conflict of laws governing the choice of forum in non-maritime tort applies generally to maritime tort, the laws of the country wherein the tort occurs governing plaintiff's remedy.

Where the plaintiff is injured on the high seas (beyond the 3-mile limit), his remedy is governed by the laws of the country whose flag the ship flies. Where the injury occurs within the territorial waters (3-mile limit) of a country, its laws will govern the injured's remedy. Treaties frequently govern a situation where the injury occurs in narrow navigable waters. (Note: All countries do not recognize the marine league; i.e., the 3-nautical-mile limit, as defining the boundary between territorial waters and the high seas.)

E. Nature of the Liability

In confining our activities substantially to the handling of cases arising out of the use of the automobile or as the result of accidents occurring under Manufacturers and Contractors, or Owners, Landlords and Tenants policies and related forms, we have become accustomed to applying those well-entrenched and well-settled legal concepts developed in our common law through centuries of precedent. These basic rules extended and modified by our legislatures and interpreted by our courts have become almost elementary in nature to those who dedicate their time and skills to the handling of such cases, whether prosecuting or defending.

Entry by most casualty companies into the ocean marine field on a limited basis, whether cognizant of this fact or not,

[12]U. S. Const. Art. III Para 2, Cl. 1; and *Stoffel v. W. J. McCahan Sugar Refining and Molasses Co.*, 35 F. 2d 602, aff. 41 F. 2d 651 (Pa.).

[13]Benedict Adm. (3d Ed.) Para. 189-191, 347, 358; *Cain v. Alpha S.S. Corp.* 35 F. 2d 717; 281 U.S. 642.

[14]*The Thielbek*, 241 Fed. 209, aff. 218 Fed. 251 (Ore.); also *The Steam Boat New York v. Rea*, 15 L. Ed. 359 (N.Y.).

[15]*The Kongsli*, 252 Fed. 267.

[16]*The City of Panama*, 101 U.S. 453.

[17]Gilmore & Black, Adm. 31-33 (1957).

[18]*Madruga v. Superior Ct.*, 346 U.S. 556.

[19]*Davis v. Matson Navigation Co.*, 143 F. Supp. 537 (Calif., 1956); 10 Stanford Law Rev. 168 (1957).

through the medium of issuance of several policy forms designed to pick up a limited marine exposure, will sooner or later require its personnel and others devoted to the service of the insurance company to venture into the field of maritime law for the purpose of handling cases emanating from this source and the frequency of which is certain to increase as time passes, for the exposure, although not well defined, is nevertheless substantial in nature.

It is the ultimate purpose of this paper to provide something less than a feeble effort to point up the nature of the liabilities which can with some probabality become manifest in the issuance of policies of the current comprehensive casualty form. It is hoped that a brief outline of applicable maritime law will make it apparent that rules governing the handling of the average casualty loss for the most part are totally inapplicable to the handling of maritime claims and losses.

Maritime law or, more particularly, "maritime torts" are civil wrongs committed on navigable waters.[20] Traditionally, admiralty jurisdiction was conceived to deal with controversies arising from the business or commercial use of watercraft, or to put it another way to provide a body of law for the adjudication of disputes and controversies in consequence of the operation of the merchant marine. Those considerations so important in inspiring and encouraging the development of a merchant marine have become a vital part of admiralty, often producing laws which appear to be in sharp conflict in principle with other branches of the law.

It must, therefore, be realized that exigencies peculiar to the operation of a merchant marine have necessarily produced unique features in the law intended to govern the conduct of man and vessel.

As has already been suggested, the courts have not as yet undertaken to distinguish to any extent between the law applicable to the commercial use of watercraft and that applicable to private or pleasure use of watercraft. In fact, in rather all-embracing decisions the word "vessel" includes every description of watercraft capable of being used as a means of transportation on water and it is subject to admiralty jurisdiction whatever may be its size, form, capacity, or means of propulsion,[21] and the status of a craft as a vessel depends not on the use to which it is put but on the use to which it is capable of being put.[22] Therefore, it seems important that we have at least a "speaking acquaintance" with those rules of admiralty which are likely to come into focus in the everyday ownership, maintenance, and use of a pleasure boat.

It is important to bear in mind that the draftsmen of the liability policies presently picking up liability of a restricted nature arising out of the operation, etc., of pleasure craft, clearly intended to exclude claims arising from injuries to or death of any employee either paid or entitled to be paid in whole or in part by the provisions of any workmen's compensation law. This intent is expressed by the following or similar language:

> This policy does not apply to bodily injury to or sickness, disease, or death of any employee of the insured arising out of and in the course of his employment by the insured if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law.
> . . .

It would appear that there are generally two classes of claimants who might become involved in boating accidents; namely, individuals who properly might be classified as "seamen" or employees of the skipper or owner of the vessel, and third persons who are in no way in privity with the skipper or owner of the vessel. First impression might well suggest that we could dismiss the first classification of perons in view of the fact that being employees they would be subject to a workmen's compensation law of some type and thus within the exclusion set forth in the policy. However, as one inquires into what legally constitutes a "seaman," it becomes evident that this determination is not a simple one and is fraught with doubt. Further, once having determined that a person comes within the category of a seaman, then there are several remedies open to him in his action

[20] *Berwind-White Coal Mining Co. v. City of New York*, 135 F. 2d 443.

[21] *Meyers v. Hankins Bros.*, 5 La. Ap. 190.

[22] *London Guarantee and Accident Co. v. I.A.C. of Calif.*, 256 Pac. 857; *The Trim Too* (*supra*).

against the owner, operator, or ship to recover for his injuries or illnesses.

It must also be borne in mind that there probably is no one person in our democratic way of life possessing greater power or authority than the master or skipper of a vessel, whether it be of the commercial or pleasure variety including, among other things, the authority to commandeer his guests into the service of the vessel under justifiable circumstances, and the power to direct persons to act under his instructions in the interest of the safety of the ship, crew, and passengers. He can compel abandonment if the circumstances so indicate this to be a proper directive. Thus, persons aboard a vessel frequently find themselves in unusual circumstances and if injured there arises a variety of remedies.

The following is an attempted classification of persons who conceivably can be potential claimants against the master or owner of a boat:

I. EMPLOYEES

A. *Seamen.*
B. *Longshoremen.*
C. *Shore employees entitled to state workmen's compensation.*

II. THIRD PERSONS

A. *Passengers.*
B. *Guests.*
   1. Business Visitors.
   2. Licensees.
   3. Trespassers.
C. *Occupants of other vessels.*
D. *"Pedestrians."* (*Bathers and swimmers*).

A brief analysis of the law involving the most troublesome of these classified groups is indicated:

I. EMPLOYEES

A. *Seamen.*

In non-fatal cases a seaman can elect one or more of the following remedies:

1. The right to maintenance and cure.
2. The right to indemnity for injury caused by unseaworthiness of the vessel.
3. The right to damages for injuries caused by negligence in the operation, maintenance, etc. of the vessel.[23]

The rights of seamen are controlled by the ancient maritime law which in part has become codified through the passage of time. It has been the policy of all maritime nations, including the United States, to afford its seamen the greatest degree of protection in the performance of his duties as such, and thus seamen have been treated as wards of admiralty.[24]

1. *The right to maintenance and cure.*

It is generally the concept of the law of this nation that any member of the crew, including the master or captain, who becomes ill during the voyage, is entitled to maintenance and cure to the end of the voyage. This right arises out of a personal indenture, historical in nature, by which the seaman is bound to his ship and in return the vessel is bound to him in maintenance and cure. [25] The duty to provide maintenance and cure does not rest upon the concept of negligence or culpability on the part of the vessel, its master, crew, or its owner; but rather is contractural in nature and is an absolute right to which the employee or seaman is entitled, it being necessary only to show that the injury or illness manifested itself during the employment notwithstanding the fact that the origin of the illness or injury may have been a condition pre-existing the seaman's employment.[26]

The most troublesome aspect in connection with this subject is the duration of the shipowner's obligations. The earlier cases suggested that the duty extend "for a reasonable time after the termination of the voyage," and this is a question of fact. Our appellate court recently considered this problem in the *Point Fermin* case wherein it states: "Under the facts of this case the payment of maintenance should not have ceased the moment the seaman was able to leave the hospital but should have been continued for a reasonable time and until it became apparent that the injury could not be benefited by further treatment."[27]

Cure has been more particularly defined as care. In view of the fact that maintenance and cure proceeds upon the theory of liability without fault, it must be furnished, therefore, on the basis of

[23] "The Law of Employees Injuries and Workmen's Compensation" by Hanna, p. 501.

[24] *Miller v. Standard Oil Company*, 199 F. 2d 457 (1952).

[25] *Enochasson v. Freeport Sulphur*, 7 F. 2d 674 (1925).

[26] *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525 (1938).

[27] *The Point Fermin*, 70 F. 2d 602; *The Osceola*, 189 U.S. 158.

a seaman's need, whether the injury or illness results from negligence or accident. "Cure" (or care) includes nursing and medical attention although there is no duty on the part of the ship owner to in every case "cure" the seaman of his injury or malady, the duty being in the nature of a formal obligation to provide maintenance and "care" until the condition would justify a medical discharge or until the condition has become stationary and not apt to be benefited by further treatment.[28] The employer's liability is usually discharged upon the ship's arrival in port by placing the disabled seaman in the United States Marine Hospital.

"Maintenance" includes food and quarters comparable to those to which the seaman was entitled while at sea. The fact that a seaman can procure maintenance and cure through other sources or the fact that he has other remedies available to him does not relieve the shipowner from his obligation to provide same.[29] The more recent cases hold that a shipowner is liable for maintenance and cure not only when illness or injury manifests itself aboard a vessel, but while the vessel is temporarily idle awaiting repairs,[30] or where the ship's business requires that the seaman leave the vessel in the performance of same.[31] Under this doctrine of contract of employment, the seaman is not entitled to maintenance for life if permanently injured,[32] nor to a lump sum award for an unpredictable period of incapacity.[33]

A failure to furnish maintenance and cure is actionable by the seaman for any consequences flowing therefrom in that he can recover the necessary expense and in addition thereto compensation for hurt and damages for loss of future earnings on the theory that such failure has created a "personal injury."[34] Such a cause of action is actionable not only by the seaman himself during his lifetime, but by his personal representative after his death.[35]

The seaman is entitled to receive maintenance and cure irrespective of his other rights independently and cumulatively and without any need for election of a remedy.[36]

Although the right to maintenance and cure is an almost absolute one, wilful misbehavior or a wilful act of indiscretion may deprive a seaman of this protection.[37] Such things as drunkenness, absence without leave or contrary to shore orders, culpable failure to perform duties, and unreasonable refusal to accept proffered medical or hospital treatment constitute a defense.[38]

The rule of maintenance and cure is one of the earliest recognitions of an employer's responsibility to a sick or injured seaman arising independent of fault, and is entirely outside the scope of defenses which one normally finds in a liability arising in tort. Therefore concepts of contributory negligence, the fellow servant doctrine, and assumption of risk have no place in the determination of a seaman's right to maintenance and cure. Even though this right springs from a contractual relationship between employer and employee, the usual rules for breach of contract are inapplicable.[39] The doctrine upon which this maritime right is based is markedly different from workmen's compensation principles[40] in that the remedy is more liberal than a compensation system and that the illness need not arise out of the employment. Benefits are generally greater than those provided under a workmen's compensation system. Thus it would appear that even though in such cases the relationship of employer and employee exist, there is no workmen's compensation law involved, benefits to which the employee would be entitled, and therefore there seems to be no basis under a liability policy for a denial of coverage unless such policy contains pro-

[28] *DeZon v. American President Lines*, 318 U.S. 660 (1942).
[29] *Cortes v. Baltimore Insular Line*, 287 U.S. 367.
[30] *Sperbeck v. Burbank*, 88 F. Supp. 623 (1950).
[31] *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943); *Sullivan v. U.S.*, 73 F. Supp. 525 (1948).
[32] *Luksich v. Misetich*, 140 F. 2d 812 (1944).
[33] *Campbell v. American Foreign S.S. Corp.*, 116 F. 2d 926 (1941).
[34] *Ladjimi v. Pacific Far East Line*, 97 F. Supp. 174 (1952).
[35] *The Point Fermin (supra)*.
[36] *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1943); *Stalker v. S.E. Oil Delaware*, 103 F. Supp. 43 6 (1952).
[37] *Mullen v. FitzSimons and Connell D & D Co.*, 199 F. 2d 557 (1952).
[38] *Aguilar v. Standard Oil Co. of N.J. (supra)*; *Mullen v. FitzSimons and Connell D &D Co. (supra)*; *Luth v. Palmer Shipping Co.*, 210 F. 2d 224 (1954).
[39] *Warren v. U.S.*, 340 U.S. 523 (1951); *Simms v. U.S.*, 186 F. 2d 972 (1951).
[40] *Smith v. U.S.*, 167 F. 2d 550 (1949).

visions that would defeat such a claim upon the theory that it was a quasi contractural liability rather than one arising out of tort or accident. A defense based upon such grounds would seem to be virtually without merit.

2. *The right to indemnity for injury caused by unseaworthiness*:

As in the case of maintenance and cure, recovery for injury sustained because of unseaworthiness of the vessel is likewise a species of liability without fault. It, too, is in the nature of a breach of contract upon the time-honored principle that the vessel and her owner, in contracting for the services of the seaman, warrant to him that the vessel is seaworthy in all its aspects and that failure of anything concerning seaworthiness constitutes a breach of warranty. This is a species of the failure-to-provide-a-safe-place-to-work doctrine and extends not only to the ship and its equipment but also to general living conditions aboard provided for the voyage, including the supplying of a competent master and an adequate crew.[41]

Thus again we have a situation where the liability of the vessel and its owner is in no way dependent upon the exercise of due care or lack thereof, and the concept of negligence and contributory negligence so well entrenched in our common law principles play no part in the determination of liability for unseaworthiness.

However, perfection is not required of the ship owner but rather the supplying of a vessel and her equipment that is reasonably adequate including materials, equipment, stores, officers, men, and outfitting adequate to serve the trade in which the vessel is employed.[42]

It is important to note that injury or illness caused by the negligence of a fellow servant or officer constitutes a valid defense to an action brought by the injured seaman for unseaworthiness and, therefore, inasmuch as most injuries and illnesses are due to the negligence of a fellow servant, causes for action for unseaworthiness are not frequently brought.[43]

Damages recoverable for unseaworthiness are compensatory, full indemnity being allowed for injury resulting from a variety of conditions within the vessel not relating to the culpability of the crew or other personnel aboard. Unlike the action for maintenance and cure, there are certain defenses to an action for indemnity for unseaworthiness.

Contributory negligence has been replaced by the admiralty rule of comparative negligence which serves to reduce the award for indemnity in proportion to the percentage of negligence of which the plantiff contributed by his misconduct.[44]

Assumption of risk is applicable only to illness resulting from negligence of fellow seamen but has no application with respect to unseaworthiness even though the injured may have had full knowledge of the elements of unseaworthiness prior to the voyage.[45]

Finally, the last of the three basic common law defenses; namely, negligence of a fellow servant, is fully applicable to unseaworthiness as a defense.[46]

Under the doctrine of unseaworthiness no action can be maintained for wrongful death.[47]

Traditionally, recovery of indemnity for unseaworthiness was limited to seamen under immediate hire of the ship owner on or about the vessel doing anything in the furtherance of the vessel's requirement. However, in recent years this remedy has been made available to longshoremen performing loading and unloading functions historically performed by the ship's crew.[48]

The principle has further been extended to apply to employees of private stevedoring companies and to marine painters.[49]

What portends the future expansion of this already liberal doctrine only time will tell, but it is already suggested by the United States District Court for Virginia that: "The day may come, if it has not already arrived, when the doctrine of unseaworthiness will be extended to all business invitees aboard ship."[50]

A seaman who has a claim for indem-

[41]"Modern Trials", by Belli, p. 444; *Boboricken v. U.S.*, 76 F. Supp. 70 (1947).
[42]*Turcich v. Liberty Corp.*, 119 F. Supp. 7 (1954).
[43]*Patten-Tully Transp. Co. v. Turner*, 269 Fed. 334 (1920).
[44]*The H. A. Scandrett*, 87 F. 2d 708 (1937).
[45]*Mahnich v. South S. S. Co.*, 321 U.S. 96 (1944).
[46]*Chelentis v. Luckenbach S. S. Co.*, 247 U.S. 372 (1917).
[47]*Turcich v. Liberty Corp.* (*supra*).
[48]*Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).
[49]*Lundberg v. Prudential S. S. Corp.*, 102 F. Supp. 115 (1951).
[50]*Caudill, Jr., v. Victory Carriers*, 149 F. Supp. 11 (1957).

nity for unseaworthiness as well as a claim for maintenance and cure, is not required to make an election between these remedies. He may sue separately or he may join both causes in a single action;[51] nor does pursuit of a Jones Act remedy bar the act to recovery for maintenance and cure under general admiralty law.[52]

A seaman injured while performing services for the ship, whether at sea or on land, has a right to recover for maintenance and cure if no tort is involved, or if a tort is involved then under the Jones Act; but if he elects to accept state workmen's compensation benefits while working on the dock, he is precluded from asserting a claim for maintenance and cure for the same injury.[53]

2. (a) *The Federal High Seas Death Act*

Not unlike the common law, there was historically no statutory provision in admiralty to provide a remedy for wrongful death.[54] To alleviate this "void" in this branch of the law, many courts adopted a practice of applying state "wrongful death statutes" to such fatalities,[55] and in some instances even undertook to apply the death provisions of state workmen's compensation statutes.[56]

To overcome this situation, Congress passed the "High Seas Death Act" on March 30, 1920.[57] This federal "Lord Campbell's Act" provided a remedy for the death of *any* person whether employee or otherwise occurring on the "high seas," which is defined as being beyond a marine league (3-mile limit), from the shore of any state, the District of Columbia, or the territories or dependencies of the United States, not being applicable to the Great Lakes, to navigable waters within the Panama Canal Zone, or to waters within the territorial boundaries of any state.[58]

Passengers are within the coverage of this statute but it has been held that land-based employees of an independent contractor doing work upon a ship in dry dock are not.[59] The action must be instituted by the personal representative of "any dependent legally or morally entitled to support."[60]

The allowable measure of damages is the pecuniary amount the beneficiary could have reasonably expected to receive had the deceased survived.[61]

Recovery under the act is dependent upon the showing of negligence on the part of the defendant, the doctrine of comparative negligence being applicable between parties.[62]

3. *The right to damages for injury caused by negligence (The Jones Act)*:

Historically a seaman injured in the course of the ship's business was limited in his remedy to an indemnity for injuries resulting from unseaworthiness, or, if illness developed during the voyage, to a claim for maintenance and cure for the duration of the illness. Negligence of a fellow employee as the cause of either the injury or the illness constituted a defense. Coincidentally, a seaman was unable to recover for injury or illness caused by the negligence of the ship's master or her crew.[63] To overcome this patent inequity, Congress passed the "Merchant Marine Act" on June 5, 1920, Section 33 of which relates to seamen, and is known as the Jones Act.[64]

Congress used as a format for the Jones Act "all Federal statutes modifying or extending a right or remedy in cases of personal injury to railway employees in interstate commerce." This had the effect of making the Federal Employer's Liability Act of 1908 applicable to injuries to seamen occurring within admiralty jurisdiction whether such injuries were fatal or nonfatal.[65]

In passing, it is interesting to note that within three months Congress approved two statutes providing a remedy for

[51] *The Rolph*, 299 Fed. 52 (1924).
[52] *The Talayha*, 26 F. 2d 601 (1928).
[53] *Occidental Indemnity Co. v. I.A.C.*, 149 P. 2d 841 (1944); *Owens v. Hammond Lumber Co.*, 8 F. Supp. 392 (1934).
[54] *The Harrisburg*, 119 U.S. 199 (1886).
[55] *Great Lakes Dredging Co. v. Kierejewski*, 261 U.S. 479 (1923).
[56] *North Pacific S. S. Co. v. I.A.C.*, 163 Pac. 199 (1917).
[57] 46 U.S.C.A. 761-768.
[58] 46 U.S.C.A. 767.
[59] *Batkiewics v. Seas Shipping Co.*, 66 F. Supp. 205 (1946).
[60] *Middleton v. Luckenbach S. S. Co.*, 70 F. 2d 326 (1934).
[61] *The Black Gull*, 90 F. 2d 619 (1937).
[62] *Bugden v. Trawler Cambridge*, 65 N.E. 533 (1946).
[63] *Pacific S. S. Co. v. Peterson*, 278 U.S. 130 (1928).
[64] 46 U.S.C.A. 688.
[65] "The Law of Employee Injuries and Workmen's Compensation" by Hanna, p. 493.

wrongful death; namely, the High Seas Death Act and the Merchant Marine Act. The notable distinction between the two laws is that the former applies to passengers as well as seamen, whereas the latter covers only seamen. Further, the former applies to wrongful acts resulting in death which occurred on the high seas or beyond the 3-mile limit; whereas, the latter is applicable to death resulting from injury arising out of service to the ship without limit to the location of the ship. The courts have failed thus far to make a clear-cut distinction between the two laws although it would appear there is an area where the two would overlap; e.g., where death results to a seaman beyond the 3-mile limit.[66] The Jones Act thus amended the unwritten maritime law to provide for the seaman an in personam right of action against his employer with a right of trial by jury.[67]

The Jones Act affords a remedy only against the seaman's employer, the ship owner usually not being liable under the act for injury sustained by an independent contractor's employee.[68] The Jones Act, generally speaking, is essentially an employer's liability law which requires proof that the employer was negligent before the employee can recover.

3. (a) *Who are seamen?*

In view of the fact that the Jones Act applies only to seamen in the service of his vessel, it is of some importance to have some understanding of who are seamen. At one time this classification was quite broad in scope, having been somewhat narrowed since the passage of the Longshoremen's and Harbor Worker's Act, it generally now being understood that seamen include only one who is a member of the crew of a vessel plying in navigable waters.[69] It is not essential that the vessel be actually in the course of navigation but that it be in fact in navigation and that insofar as the seaman is concerned, he must be more or less permanently connected with the ship, and that his work must be primarily in the aid of navigation. The right to recover is based on the nature of the seaman's service and not on the place where the injury occurred.[70]

The term "seaman" has been held to embrace stevedores by limiting their recovery only to when injured beyond the 3-mile limit from shore.[71]

Since the Jones Act contains no independent language with respect to the measure of recovery, it is dependent upon the provisions of the Federal Employer's Liability Act which merely provides for damages.[72]

Thus, insofar as the Jones Act is concerned for injuries sustained by seamen, it is not in the nature of a "compensation act" but rather merely sets up remedial measures, and consequently it would seem that any attempt to exclude the claim of a "seaman" insofar as a pleasure craft is concerned—assuming he could qualify as a seaman in the first place—would probably be without merit and the policy would thus be exposed to such claim.

B. *Longshoremen*

As a result of a demand to extend some system of compensation to the maritime field, the Federal Longshoremen's and Harbor Workers' Act was enacted by Congress in 1927.[73] The benefits of the act extend generally to employees or an employer who performs services on navigable waters including dry docks, but the workmen must not have been employed as a master or a member of a crew of any vessel nor employed by the master to load, unload, or repair any vessel under eighteen tons net,[74] and the injured workman also must not have been an officer or an employee of the United States or any agency thereof, or of any state or foreign government or of any political subdivision thereof. Further, he cannot have been entitled to a recovery of compensation under any state compensation law.

1. *Who are longshoremen?*

Longshoremen usually include such people as handymen, stevedores, and longshoremen, workmen repairing the

[66] 31 Yale Law Journal 115, at p. 126.
[67] *Pate v. Standard Dredging Co.*, 193 F. 2d 498 (1952).
[68] *Roth v. Cox*, 210 F. 2d 76 (1954); *Internat'l Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).
[69] *McKie v. Diamond Marine*, 204 F. 2d 132 (1953).
[70] *O'Donnell v. Great Lakes D & D Co.*, 318 U.S. 36 (1943).
[71] "Jurisdiction over Injuries to Maritime Workers", by Warren Pillsbury, Va. Law Rev., May 1932.
[72] 45 U.S.C.A. 51.
[73] 33 U.S.C.A. 901 (March 4, 1927).
[74] 33 U.S.C.A. 902 and 903.

ship, and railroad train crews on car ferries. Workers on ships who are not vessel masters or members of the crew are covered by the act even when they travel with the ship; i.e., when they are traveling stevedores, fishing boat workers, salvage employees, meat handlers, and workers on vessels who assist in fueling other vessels, etc.[75]

Although it has been stated that the Longshoremen's and Barbor Workers' Act is a "system of compensation," still it has been suggested by certain of the courts that this act is in fact a "damage statute." Therefore, there remains some doubt as to whether the exclusion found within the comprehensive liability policy concerning injuries to employees who are entitled to the benefits of a workmen's compensation act, is sufficient to exclude a claim presented by an employee under the Longshoremen's and Harbor Workers' Act.

C. *Shore employees entitled to state workmen's compensation benefits*:

Employees injured on or about a boat under circumstances which entitled them to the benefits of a state workmen's compensation law would obviously be excluded under the exclusion found in the comprehensive liability policy forms so that further discussion of this class of employee is unnecessary.

In passing it should be borne in mind that there is more than a "twilight zone" or "gray zone" as to what category an employee may properly find himself under the three basic types of statutes; that is, the Jones Act, the Longshoremen's and Harbor Workers' Act and the State Compensation Act. In fact, there are many areas where there is sufficient doubt that an employee would be held to be entitled to benefits under one or the other of these acts, but at best there exists much confusion in this determination.

Insofar as pleasure craft are concerned, it would seem that the exposures to these various liabilities can arise from several sources.

When one serves in the United States Coast Guard Auxiliary—which is purely voluntary on the part of the owner and/or skipper, he not being subject to call at any time—one of the requirements is that he have a "crew" aboard which is adequate to take care of the requirements of the assignment. The Auxiliary prefers that this crew comes from the ranks of their own membership, although under certain circumstances they will voice no objection to the use of individuals not members of the Auxiliary. In fact, while in the service of the vessel, these members of the crew provide the basis for a claim by the owner-skipper against the Auxiliary for subsistence during the time of service. Whether these persons, if injured, would constitute members of a "crew" within the meaning of the Jones Act, of course, remains doubtful because actually the element of employer-employee does not exist in the sense that no wage is paid, but still subsistence is usually supplied and the owner-skipper possesses great authority over such persons.

In predicted log races, cruises, etc., the squadron also refers to those aboard as members of the "crew" to distinguish those who assist in the details of the cruise or race by aiding in the navigation, securing of the lines, taking care of the vessel generally, from those people who are merely guests. However, insofar as the United States Power Squadron is concerned, no subsistence is paid to the owner-skipper for his crew members, but it is customary as a matter of courtesy to provide food, etc., for such people.

It is customary for small boat owners to have their friends, acquaintances, or other boat owners aid them in repairing and maintaining their respective boats so that there is a good deal of interexchange of labor and assistance. Usually no consideration in the nature of a wage passes to the parties but certainly there is very often a consideration flowing from such people to the owner-skipper in exchange for the same kind of courtesy when the reverse is true. Just what category these people might find themselves in, in the case of injury, again is doubtful.

It is also customary for owners-skippers to have numerous kinds of technicians come aboard to perform services on the boats such as mechanics, electricians, carpenters, etc.—usually, however, while the boat is secured to the dock. It is also customary for delivery men or service men to go aboard to deliver supplies, materials, etc.

Insofar is all of these people are concerned, considerable doubt exists at this time and will undoubtedly continue to

[75] "The Law of Employee Injuries and Workmen's Compensation" by Hanna, p. 411.

exist for some time as to the exact nature of their relationship in the eyes of the law. It is submitted, however, that admiralty is very broad in its interpretation seeking to extend the benefits of the law to the injured person in every conceivable kind of situation, and therefore strained interpretations of the law would be anticipated as to these people who, strictly speaking, are not employees but who may well be categorized in the law as seamen or longshoremen.

II. Third Persons

The comprehensive general liability policy intends to extend to the liability arising as a result of injuries to this broad group of persons including passengers and guests, as well as "pedestrians" (bathers and swimmers). This discussion will relate to the liabilities which may arise as the result of bodily injury to third persons.

Fundamentally, liability is imposed in a maritime tort upon the basic "fault" concepts similar to an ordinary negligence action. However, certain aspects of admiralty law vary from the accepted common law principles. Therefore, the ultimate decision as to liability in a bodily injury case involving a pleasure-boat accident will depend upon whether ordinary tort law or admiralty doctrines are applied. Section 1333 of the Judicial Code permits the enforcement of rights created by general maritime law under common law remedies in the state courts or on the civil side of the federal district courts. The existence of this concurrent remedy gives the injured party a choice of forum. In order to more fully explore the application of the various admiralty and non-admiralty tort principles, they will be discussed under separate headings.

Duty

As indicated earlier maritime liability is grounded in basic "negligence" concepts and the general duty imposed upon the pleasure-boat owner is to conduct the operation of his craft in a careful and prudent manner. Although the decision involved a collision action, an early case stated the general duty imposed in the following manner:

> "He (the owner of a pleasure-cruiser, 30 feet long) acted as if the very smallness of his boat, or some privilege inherent in pleasure-craft, entitled him to cast all the burdens of avoiding collision on the other vessel. There is no legal distinction in respect to the rules of navigation between vessels operated for pleasure and for profit, between large boats and small ones, or those with a numerous crew and those operated by one man."[76]

The common law rules regarding the duty owed to licensees and trespassers are applied with equal force in a maritime case.

> An invitee is owed the duty of reasonable care,[77] whereas a trespasser or mere licensee coming aboard must take the premises as he finds them, and he comes on board at his own risk.[78] No duty is owed by a shipowner to a mere licensee or a trespasser other than to refrain from willfully injuring him, or knowingly allowing him to run into danger; and no liability attaches to the owner of the vessel for an accident injury to a licensee.[79]

The application of these common law rules is further demonstrated in a case where a member of a fishing party on a 26 foot boat was injured when a large wave overturned the boat. Although the court found no actionable negligence, it supported the rule that the duty owed to the business invitee was to exercise "a high degree of care."[80]

Contributory Negligence—Assumption of Risk—Guest Statute

"The common law doctrine of contributory negligence ordinarily prevents any recovery by the person injured, but in a maritime case under admiralty law," contributory negligence may not be a bar to recovery but merely mitigate the damages to the extent of the injured person's negligence.[81] An exception in admiralty courts may arise where the action is brought by a representative for wrongful death under a state statute in which case the admiralty court will apply the doctrine of

[76] *O'Brien Bros.*, 258 F. 614 (2 Cir. 1919).
[77] *Calanchini v. Bliss*, 88 F. 2d 82 (9 Cir. 1937).
[78] *Gunnarson v. Robert Jacob, Inc.*, 94 F. 2d 170 (2d Cir.).
[79] 80 C.J.S. 820.
[80] *Black v. The Nereid, et al.*, 40 F. Supp. 736 (D.N.J. 1941).
[81] *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953).

contributory negligence. This was illustrated in a libel action which was instituted for damage caused by a negligent extension of a pier into Lake Erie with which a boat collided. Although maritime law does not allow recovery for wrongful death, the admiralty court applied the Ohio substantive law in its proceedings and thus allowed a showing of contributory negligence.[82] The California courts have also instructed on the doctrine of contributory negligence in an action for wrongful death involving a motorboat collision at night on Lake Arrowhead.[83]

Further demonstrating the application of common law principles involved is a case involving the drowning of a guest passenger on a speedboat which capsized as the result of overloading. Although rated for a capacity of ten, the owner had eighteen passengers aboard. The court found the boat to be unseaworthy when so loaded, constituting negligence for which the owner was liable. The court made reference to and discussed the defenses of assumption of risk, contributory negligence and an Act of God.[84]

Although under proper circumstances local law may be applied, one court has held that the Texas guest statute does not apply to pleasure-boats operating upon the waterways and lakes of the state of Texas. It was not applied to a swimmer-guest who was injured by the propeller while trying to re-board a boat.[85]

Limitation of Liability

There are many principles of admiralty law which we are not privileged to consider in this inquiry, but one which it seems justifies the time of investigation is the admiralty doctrine of limitation of liability. Again we must look to tradition to understand the basis for this doctrine. To encourage the shipbuilding industry and to establish on the part of the American Merchant Marine a competitive advantage with other countries, Congress passed in 1851 the Limitation of a Vessel Owner's Liability.[86] Its purpose was to limit the liability of an owner of a vessel to the value of his interest in the vessel plus the value of her freight. Foreign nations prior to that time had such statutes in force.

Although the basis for this law; namely, to confer a competitive advantage to commercial vessels, would seem to suggest that this statute of limitation of liability would apply only to commercial vessels, nevertheless it has been held applicable to pleasure boats.[87] The owner may not limit his liability if he was operating the boat [88] or if the negligence is imputable to him.[89] However, the negligence of an employee is sometimes not imputed to the owner.[90]

The admiralty principle of limitation of liability is a procedure whereby relief is granted in certain circumstances to the owner of a pleasure-boat or other vessel by permitting him to limit his personal liability for any damage or injury occurred without his privity or knowledge to the amount of his interest in the boat or vessel. This limitation is set forth in the U. S. Code.[91] The section clearly applies to cases of personal injury and death, as well as to cases of property damage.[92]

In addition, the size of the vessel is not a factor. Although it usually involves large commercial vessels, it has applied to small boats, including an 18 foot row-boat and a 19 foot speedboat.[93]

It should be noted that the doctrine applies only where the injury occurs without the privity or knowledge of the owner. The application of this qualification to the doctrine has been stated as follows:

> "As used in the statute, the meaning of the words 'privity of knowledge,' evidently, is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss,

[82] *Niepert v. Cleveland Electric Illuminating Co.*, 241 F. 2d 916 (6 Cir. 1957).
[83] *Dickey v. Thornburgh*, 187 P. 2d 132 (Ca. D.C. 1947).
[84] *Calanchini v. Bliss* (*supra*, note 77).
[85] *Shoremeyer v. Barnes*, 190 F. 2d 14 (5 Cir. 1951).
[86] 46 U.S.C.A. 181-96.
[87] *Feige v. Hurley* (*supra*); *Coryell v. Phipps* (*supra*); *The Mistral*, 50 F. 2d 957 (1931); *The Spare Time II*, 36 F. Supp. 642 (1941).
[88] *Schoremeyer v. Barnes*, 109 F. 2d 14 (1951).
[89] 46 U.S.C.A. 183 (a); *Loc-Wood Boat & Motors v. Rockwell*, 245 F. 2d 306 (1957).
[90] 46 U.S.C.A. 183 (e) (f); *Calif. Yacht Club v. Johnson*, 65 F. 2d 245 (1933).
[91] 46 U.S.C.A. 183.
[92] *A. Paladini, Inc.*, of Superior Court of San Francisco, (1933); 21 P. 2d 941; 218 Cal. 114; *Just v. Chambers*, 61 S. Ct. 687, (1941).
[93] *Grays Landing Ferry Co. v. Stone*, 46 F. 2d 394; *Petition of Colonial Trust Co.*, 124 F. Supp. 73 (D. Conn. 1954).

without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault of negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the Act, as will exclude him from the benefit of its provisions."[94]

The limitation of liability is an admiralty proceedings and must be brought in an Admiralty Court. It does not preclude the exercise of concurrent jurisdiction by a state court, although one suing at common law must admit the right to limit liability. If proceedings are brought to limit the liability in an Admiralty Court, proceedings in the other courts must be held in abeyance until the petition to limit liability has been decided. If the right of limitation is denied, the other courts may proceed. But if it is allowed, the ruling in the Admiralty Court takes jurisdiction of the entire controversy.

The following case illustrates the manner in which this doctrine may affect the liability arising out of a maritime accident. Where a small speedboat, owned by a wife but operated solely by the husband, who picked up two swimmers and permitted them to ride in a dangerous position on the boat, the court allowed the wife, as owner, to limit her liability where one of the swimmers accidentally slipped into the water and was killed by the propeller. The owner was not operating the boat and the court found that there was no privity. She did not contribute to the accident or personally participate in the act of negligence. Since liability is limited to the value of the boat where the doctrine is applied, the wife, as owner, had to pay an amount far less than the actual damages resulting from the death of the swimmer.[95]

While it is in the best interests of commercial vessels to have the advantage of limitation of liability, it is submitted that as time goes on the courts probably will become more and more reluctant to offer this benefit to private boat owners, the benefits of which in most cases will inure to the advantage of an insurance company, and thus it is anticipated that this doctrine will disintegrate as time goes on at least insofar as pleasure boats are concerned.

Division of Damages

The doctrine of division of damages is another exclusive admiralty principle which, as applied in the American courts, results in a division of damages where both parties are at fault in a collision between two vessels. Many other countries of the world apportion the damages according to the degree of fault; but with two exceptions, the American courts will total the damages and divide and assess them equally between the respective vessels, with no attempt at apportionment.[96] The two exceptions are (1) the inevitable accident, and (2) the major and minor fault rule. The first is rarely applied for there must be some Act of God and an absence of fault on either party. The second exception applies when one vessel is grossly the fault and there is doubt about the fault of the other vessel. In such a situation, the latter vessel will be relieved from liability. As indicated, this admiralty rule does not apply in state courts where if both parties were at fault contributory negligence would bar recovery. This division of damages may also apply where a negligent act results in injury to a person instead of damage to another vessel. In such a case the injured person must have been contributorily negligent and recovery will be reduced to the extent of degree of negligence contributable to that person. The courts have applied this doctrine to the operation of small boats.[97]

The doctrine was also applied in an action for damages in a collision between an oil tanker and a 38 foot motorboat. Both parties were found to be mutually at fault and hence equally liable. The tanker was not damaged, but the motorboat was lost, and there were injuries to passengers on the motorboat. In the division of damages, the tanker was allowed to offset the claims of the passengers from the amount due the owner of the motorboat.[98]

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[94] *Lord v. Goodall S. S. Co.*, 15 F. Cas. 884, No. 8506, aff'd 102 U.S. 541.

[95] *Petition of Liebler*, 19 F. Supp. 829 (W.D. N.Y. 1937).

[96] *Luckenbach S. S. Co., Inc. v. U.S.*, 157 F. 2d 250.

[97] Vol. 10, Stanford Law Review, pgs. 724-725 (July, 1958).

[98] *Davis v. The Esso Delivery No. 13*, 100 F. Supp. 285 (D.M.D. 1951).

CONCLUSIONS

It appears quite evident that the measure or amount of coverage extended under the general comprehensive liability and other forms for boating accidents is quite extensive and certainly possessed of considerable doubt as to the exact nature of the coverage. Unless some modification of this coverage is taken by the underwriters, it would seem that there still exists considerable doubt as to the size of the vessel which will be insured because of the ambiguity relating to the defined horsepower and further the fact that the coverage lends itself to an invitation on the part of the policyholder to register his boat in the name of someone else so as to fully benefit by the coverage extended under his personal liability policy, thus avoiding the necessity of purchasing a comparatively expensive yacht policy.

Further, the question as to whether the policyholder is entitled to protection under this form of coverage for claims brought by an "employee" leaves some doubt. Insofar as those employees who would be entitled to workmen's compensation benefits are concerned, this would appear clearly to be excluded within the provisions of the policy. However, an employee in the category of a seaman with the classic remedies of maintenance and cure, unseaworthiness, and negligence (Jones Act) above defined, would appear more likely to be extended coverage than not. There would seem to be more doubt insofar as the category of longshoremen are concerned, for while the Longshoremen's and Harbor Workers' Act is considered by some to be a system of compensation, the courts have referred to the statute as a damage statute.

The discussion of liability for bodily injury arising out of the ownership or operation of a pleasure-boat should serve to demonstrate some of the unique aspects which distinguish such liabilities from those which arise under circumstances whereby the remedies of the injured person are limited to the application of common law doctrines. No attempt has been made to relate these liabilities to specific provisions of a liability policy. There may be questions as to whether the policy applies generally, but once the coverage has been determined to exist on the pleasure-boat involved, there will be little question that the protection of the policy will extend as against such third-party claims.

The Doctrine of "Liability Without Fault" Should Not Be Extended to Automobile Accident Cases*

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THE ADVISABILITY of adopting a new format for the recovery of damages in cases of personal injury caused by accidents seems to hinge mainly on whether or not one advocates the abandonment of the presently governing principles of tort liability in favor of what is known as "absolute" or "strict" liability or "liability without fault." If such a change is made, a corresponding change is also to be expected with regard to the forum before which such recovery would be sought. An administrative board would, in such event, take over the courts' functions to the same extent as under workmen's compensation. This is proposed by the various plans for automobile accident compensation.

This paper is therefore designed to:

1. discuss the fundamental principles and merits of "liability without fault";
2. examine the desirability of its substitution for the principles of tort liability now practised in this country, in the light of this writer's belief in a jurisprudential distinction between the situations to which strict liability now applies and those to which it is proposed to extend it; and
3. refer to some remedial plans which might enable us to improve the present situation, without sacrificing our present system of tort liability for damages caused by injuries resulting from accidents.

Damages and Liability

A person has suffered an injury to his body. Even though the harm cannot be undone, we shall agree that the victim should be compensated in money as the only available equivalent to his corporal integrity which cannot be restored. But while we agree that he should be compensated, we disagree as to the pocket out of which such compensation is to come. When faced with this problem, the average person will attempt to find the individual whose fault caused the injury and hold him liable for the compensation due the victim. Why will the average person react in this manner? Because he has been brought up in a society in which the conviction that there should be no liability without fault is still deeply ingrained. The history of this development of the fault principle has been traced by many prominent writers[1] and has fairly recently been summarized by Lord Macmillan in the House of Lords in these words:

> . . . [T]he process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others. The emphasis formerly was on the injury sustained and the question was whether the case fell within one of the accepted classes of common law actions; the emphasis now is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent.[2]

It has also frequently been pointed out that "fault" in negligence cases "never has become quite synonymous with moral blame"[3] and that the "standard applied by the law to determine whether a man has been negligent has always been in large part an external, objective, standard. Where there is a duty to use care, one

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[1]See e.g. Prosser, Torts, 15, 315-49 (2d ed. 1955) (cited Prosser hereafter); Holmes: The Common Law, 144-63 (1881); Salmond, Law of Torts, 11-12 (7th ed. 1924); Smith, *Tort and Absolute Liability*, 30 Harv. L. Rev. 241, 319, 409 (1917); Harris, *Liability Without Fault*, 6 Tul. L. Rev. 337 (1932).

[2]*Read v. J. Lyons & Co.*, (1947) A.C. 156, 171 (1946).

[3]Prosser, 316. See also 2 Harper & James, The Law of Torts, §12.1 (1956).

must act as the reasonably prudent man would under all the circumstances"[4]

However, it must be conceded that an entirely different approach might be taken toward the solution of our problem. It might be said: This injury of a person is damage done not only to the individual as such, but to him as a member of society. Society, particularly in its present complex and most highly mechanized stage, has made this injury possible. If, for example, our victim was injured by an automobile, this is the consequence of society's permission to its members to put automobiles on the roads and fault, if any, "is one chargeable to a society which 'negligently' tolerates dangerous locomotion."[5] But, regardless of whether or not society "is to blame," since the basic function of tort law is to prevent accidents and to compensate victims of accidents that do happen,[6] the question as to who is at fault becomes immaterial. It is maintained that, since, "even with successful safety campaigns there will always be a basic residuum of destruction . . . it seems clear that the consequences of this destruction should be borne by society at large, rather than by the individual"[7] This theory has also been advocated by foreign, particularly French, scholars and has been characterized as a theory of "collective responsibility."[8] In addition, it is pointed out that society is not interested in a mere shifting of losses from A, the injured, to B, the injurer. "If the only question is whether B shall be made to pay for this loss, any good that may come to society from having compensation made to *one* of its members is exactly offset by the harm caused by taking that amount away from *another* of its members."[9] On the other hand, society *is* interested in the widest possible distribution of the losses suffered by it among all of its members, so that each will pay only a bearable portion of the common loss. How should then this loss be distributed? It is submitted that, if this philosophy of loss distribution is accepted, the only logical step toward its implementation is the imposition of taxes[10] or of compulsory contribution by *all* taxable members of society to an insurance fund.[11]

This writer does not advocate the adoption of such a plan, because he feels that a further increase of the tax burden to cover the costs of all deaths and injuries caused by accidents (regardless of fault), which in 1956 amounted to "at least $11,200,000,000",[12] would be unwarranted. Moreover, he believes in the ability of the members of society to weigh the risks to which they are exposing themselves in their everyday lives and prefers to leave it to them to cover those risks by voluntary insurance, which, as Holmes remarked, "if desired, can be better and more cheaply accomplished by private enterprise."[13] The insurance fund mentioned above would still be a fund designed to cover society's "liability." To such an insurance this writer raises objections similar to those formulated by Professor Ehrenzweig and which he expected might be raised to his own theory: "Why should the airplane passenger be able to recover from the operator of his plane because the latter should have taken out [liability] insurance, although the plaintiff himself, before boarding the plane, could very well have been expected to protect himself by [life and accident] insurance?"[14] Finally, if we cast the principles of tort liability overboard and adopt social insurance in their place, we shall have Great Britain's social insurance which provides "a comprehensive system of minimum grants, insuring everybody, regardless of personal and financial status, against the major vicissitudes of modern life, and providing a bare

[4]Harper & James, *op. cit. supra* note 3.

[5]Ehrenzweig, "Full Aid" Insurance for the Traffic Victim 3 (1954).

[6]James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 Yale L.J. 549, 569 (1948).

[7]James and Thornton, *Impact of Insurance on the Law of Torts*, 15 Law & Contemp. Prob. 431, 443 (1950).

[8]Takayanagi, *Liability Without Fault in The Modern Civil and Common Law—IV*, 17 Ill. L. Rev. 416, 427 (1923), citing writings by Demogue, Tridanfil and Duguit as representative of this theory.

[9]James, *supra* note 6, at 549.

[10]See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. Rev. 537 (1952).

[11]Oliver Wendell Holmes indicated this by saying: "The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members." The Common Law, 96 (1881).

[12]National Safety Council, Accident Facts, p. 4 (1957).

[13]Holmes, The Common Law, 96 (1881).

[14]Ehrenzweig, *Assurance Oblige, A Comparative Study*, 15 Law & Contemp. Prob. 445, 451 (1950).

minimum subsistence, but no more"[18] minus Great Britain's recovery under those same tort principles of negligence law which even she refused to scrap.[19]

Nevertheless, the theory of distribution of losses among *all* members of society by way of taxation has the merit of consistency. It is the logical and only implementation of the idea of "collective responsibility."[17] On the other hand, any theory which rejects such method of implementation, while advocating the basic concept of distribution, and attempts to accomplish such distribution by establishing "group" or "enterprise" instead of collective responsibility, seems to this writer a half-measure theory, deserving such label certainly no less than the various exceptions tending toward strict liability which have been ingrafted upon the fault principle of tort law.

Enterprise Liability

A number of eminent writers, among them Professor Albert A. Ehrenzweig, Dean Robert A. Leflar, Professors John V. Thornton, Harold F. McNiece and Fleming James, Jr., to name only a few, assert that "The law of negligence as it exists today is obsolete,"[18] that the "negligence rule, though phrased in terms of fault, has, with regard to tort liabilities for dangerous enterprise, come to exercise a function of loss distribution previously developed mainly within the rules of strict liability" and that this "new function of 'fault' liability has transformed its central concepts of reprehensible conduct and 'foreseeability' of harm in a way foreign to its language and original rationale and has thus produced in our present 'negligence' language a series of misleading equivocations."[19] It is pointed out that our concepts of liability for fault have been riddled by exceptions through which strict liability has been imposed and that, even where language of "fault" is used, "Courts and juries have been increasingly willing to find legal fault with less and less moral blameworthiness on the part of the actor."[20] It is therefore suggested that we should discard the "horse and buggy rules in an age of machinery"[21] and adopt the principle that "each enterprise should pay its own way,"[22] *i.e.* be liable for the harm it causes regardless of fault. It is reasoned that society allows the "entrepreneur" to pursue his potentially dangerous activity because it is socially desirable, but, in return, the entrepreneur must assume the risk of such an enterprise, especially since he is in a better position to insure himself against such risks, *i.e.* he is the better "risk bearer." Thus, distribution over the widest area, *i.e.* among all members of society, is rejected as contrary to the "social policy" underlying a free enterprise system and, being indirect subsidization of an enterprise at the expense of society generally, it is considered "as much a violation of this social policy as is direct subsidization out of the public treasury."[23]

However, Professor Ehrenzweig, for example, recognizes, of course, that a rule of "unrestricted liability for all causation . . . would not only be impracticable, but could be rationalized only by the paradoxical argument that the innocent injured is 'still more innocent than the innocent injurer' . . ."[24] and he expresses his belief that fear of such a rule may have been the reason why the "struggle between an injurer's and an injured's law of tort has, up to the present time, been fought within a law of fault liability."[25] He, therefore, advocates the adoption of liability for "negligence without fault" for harm "typically caused by lawful conduct."[26] This then means that liability regardless of fault should be imposed whenever what Professor Ehrenzweig calls the "typicality test" is met. He explains the application of the test in an example of the keeper of a wild animal whose liability would, under the test, extend to that "'general type of harm' the causation of which was foreseeable and voidable when he started his hazardous activ-

[15]Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 Harv. L. Rev. 241, 242 (1949).

[16]"This possibility was thoughtfully explored in England, and rejected, largely because of unwillingness to deprive injured people of the chance of the much greater recovery at common law." James, *supra* note 10, at 542.

[17]Takayanagi, *supra* note 8.

[18]McNiece and Thornton, *Is The Law of Negligence Obsolete?*, 26 St. Johns L. Rev. 255, 276 (1952).

[19]Ehrenzweig, Negligence Without Fault, 86-87 (1951).

[20]James, *supra* note 10, at 546.

[21]James, *supra* note 6.

[22]Leflar, *Negligence in Name Only*, 27 N.Y.U.L. Rev. 564, 584 (1952).

[23]*Ibid.*

[24]Ehrenzweig, *op. cit. supra* note 19, at 14.

[25]*Id.* at 13.

[26]*Id.* at 14.

ity."[27] Thus, while the activity is lawful, liability for the "typical harm" would be imposed as "one of the necessary burdens and expenses incident to such activities."[28]

In analyzing this theory the first difficulty encountered is doubt as to what constitutes an "enterprise." Is it any activity which involves the risk of harm to others? If so, then everyone pursuing such activity acts "at his peril." Obviously, Professor Ehrenzweig does not mean that. "Such a proposition is merely ridiculous. Life would not be worth living on such terms. Life never has been lived on such terms in any age or in any country,"[29] and Professor Ehrenzweig expressly rejects the rule of "unrestricted liability for all causation."[30] Just as Professor Wex Malone,[31] this writer, too, has been unable to find a definition of "enterprise" in Professor Ehrenzweig's book, except in his explanation of "quasi-negligent" activity as "an activity initially negligent but legalized because of its social value."[32] In turn, does "initially negligent" mean "ultrahazardous," as used by the *Restatement of Torts* in section 519? Probably not, since, as the author points out, activities which are a "matter of common usage" are excluded by section 520 of the *Restatement,* whereas the author apparently includes them in his term "enterprise." It seems, therefore, that the word "enterprise," as Professor Ehrenzweig uses it, cannot be explained without combining it with the "typical harm" inherent in it and which, under the theory, is a prerequisite of liability regardless of fault. Thus, an enterprise is, presumably, any lawful activity capable of producing a type of harm to which the "typicality test" applies. Again reference can be made to Professor Wex Malone's lucid criticism[33] revealing the difficulties in using this extremely complicated test. He shows that it is not clear, for example, whether "typicality" should apply to the type of risk or also to the way in which the harm was inflicted, that considerable doubt may arise as to whether a harm is or is not typical, even with respect to examples given by Professor Ehrenzweig himself. If, Professor Malone reasons, a typical risk is one which is frequently connected with the activity in question, then the test can be applied "simply by holding the enterprise liable for the great bulk of the risks to which it exposes the public, for nearly all such risks are in general typical of the operation," in which case we are back to unrestricted liability for all causation.[34]

Practically speaking, would a traffic policeman be liable (regardless of fault) if his signals are misunderstood and, as a result, somebody is injured in a collision? Is he the entrepreneur or the city which employs him? (We must remember, of course, that the rule of *respondeat superior* would not apply under the theory.) Was the harm typical to the enterprise? It probably belonged to the "general type of harm" the causation of which was foreseeable and avoidable when he started his hazardous activity. Should he have, therefore, insured himself against the risk? Or should the city have done so? If, as a result of the same misunderstanding, an automobile driver injures a pedestrian, which enterprise becomes liable, the driver's or the policeman's or both? Is not the harm "typical" for both? How about the car manufacturer's enterprise? When he embarked upon his enterprise he must have been fully aware of the fact that the car he made, good or bad, might, when driven, cause injury to someone. Isn't, therefore, his activity "quasi-negligent" and the harm resulting "typical" for his enterprise? Or does his liability end when he delivers the car to the dealer, with the dealer's enterprise taking over liability? If so, does this mean we eliminate *MacPherson v. Buick,*[35] even if the car was made negligently?

Dean Leflar's illustrations of "enterprise" do not seem to do much more to clarify the above problems. He states: "The enterprise or activity may have been the operation of a factory or a trucking business or a powder magazine, it may have been the driving of two of ten million pleasure automobiles on a Sunday . . . . *it may have been anything*

[27] *Id.* at 50.
[28] Harper, A Treatise on the Law of Torts, 351 (1933).
[29] Winfield, *The Myth of Absolute Liability,* 42 L.Q. Rev. 37, 38 (1926).
[30] Ehrenzweig, *op. cit. supra* note 19, at 14.
[31] Malone, *This Brave New World—A Review of "Negligence Without Fault",* 25 So. Calif. L. Rev. 14 (1951).
[32] Ehrenzweig, *op. cit. supra* note 19, at 66.
[33] Malone, *supra* note 31, at 18, 19.
[34] *Ibid.*
[35] 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696 (1916).

[emphasis added]"[36] If "anything" may be an enterprise which is pursued at the entrepreneur's peril, we are again faced with the unacceptable rule of "unrestricted liability for all causation."

However, even if we knew what is meant by "enterprise liability" and by "typicality of harm," other features of this theory of liability would be open to objection. One of the justifications of enterprise liability has been the theory that the entrepreneur derives material or ideal *profit* from the dangerous activity. The financial loss suffered because of his liability is reduced by such profit, but remains smaller than the loss the victim would have to bear in the absence of enterprise liability and in case of his failure to recover from the injurer under tort principles.[37] But, we may ask, is the entrepreneur the only one who derives profit from his activity? Supposing goods are transported by the seller's truck from the seller's warehouse to the buyer's establishment and en route a person is injured. "Is it for the benefit of the seller or the buyer that the seller sends his goods to the buyer? Is it for the benefit of an enterpriser or of the public or of both that the railroad is operated?"[38] Doubt has been cast by another writer on the theory that "one who has the benefit of the thing, should, in exchange, have the responsibility for the damages that it causes"[39] in these words:

> But there may be doubts on the value of this justification, when one reflects that in our day everyone derives benefit from the employment of such dangerous things as machines and automobiles, even those who do not possess them. If other persons did not possess them, they would not have available in their homes or near at hand many things which we regard as indispensable.[40]

The same author mentions as one example that everybody in the community has an interest in bus services and derives benefit from these potentially dangerous vehicles. Hence, the conclusion that the entrepreneur should alone be liable under the benefit theory does not seem convincing.

However, it is maintained that the entrepreneur is the "better risk bearer," because he is "probably" in a better position than the victim to insure himself and thus spread the loss among holders of a similar type policy, even though not over society as a whole. Two objections might be raised to this theory. First, it is hard to accept the contention that defendant should pay merely because he is richer than the plaintiff and that a motorist, for example, must be made to pay simply because he "has the deeper purse, *or should have if he undertakes the car-owning enterprise* [emphasis added]."[41] Several writers have rejected this approach. One pointed out that such a rule would penalize the "industrious, courageous and intelligent,"[42] another stated that "our sense of justice is outraged when claimants are favored merely because they happen to be poor and defendants are disfavored merely because they happen to be rich."[43] The other objection is that it is by no means always true that the defendant is the better risk bearer than the plaintiff. This has been clearly demonstrated by Professor Morris who reaches the conclusion that "a general rule of absolute enterprise liability or liability for hazardous undertakings is bound to saddle some kind of defendants with losses they can bear no better than the kinds of plaintiffs compensated."[44]

It is also argued that the entrepreneur is in a better position to bear the risk because he can pass the cost of liability or insurance on to the consumer. On the other hand, it has been shown that the "economics of this argument is . . . built on dubious assumptions and oversimplifications . . ."[45] and that the theory might apply to monopoly industries, but certainly not to many small manufacturers and enterprises operating on marginal profit, and that a price increase made necessary by the absorption of such cost might, to an individual, mean pricing himself out of the market.[46] Besides, should

[36]Leflar, *supra* note 22, at 578.
[37]Ehrenzweig, *supra* note 14, at 447.
[38]Takayanagi, *supra* note 8, at 430.
[39]Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 Am. J. Comp. L. 156, 160 (1953).
[40]*Id.* at 164.
[41]Leflar, *supra* note 22, at 581.
[42]Lucey, *Liability Without Fault and The Natural Law*, 24 Tenn. L. Rev. 952, 955 (1957).
[43]Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 Yale L.J. 1172, 1177 (1952).
[44]*Id.* at 1179.
[45]*Id.* at 1176.
[46]Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 Tenn. L. Rev. 938, 947 (1957).

we not remember that "the law of torts even today affects large numbers of people who are neither employers nor manufacturers, [and that] for them the difference between strict and non-strict liability is still important,"[47] in other words that there are people who cannot pass the cost on to anyone?

Insurance Cost

This brings up the question of insurance premium costs for liability regardless of fault in general. We are reminded that the abolition of the negligence requirement has been advocated "without dealing in any positive fashion with the mounting cost of insurance."[48] It is quite true, of course, that accurate studies of such costs based on a specific rule of law are very difficult.[49] However, attempts at estimating costs have been made, at least in the field of automobile accident liability. Thus, Mr. Charles J. Haugh, Actuary for the National Bureau of Casualty and Surety Underwriters, calculated in 1929 that the *minimum* cost of compulsory automobile compensation insurance (based on liability regardless of fault) in New York would be $80,351,695 a year, *not* considering the effect of increased claim frequency or the cost of accidents occurring outside of New York State. In 1930, Austin J. Lilly, General Counsel of the Maryland Casualty Company, estimated that, taking into account a modest cost of administration of only 20 per cent, medical, hospital and funeral expenses and a few other factors, such as an increase in claims due to an increased "claim-consciousness" which such plans will inevitably evoke, the loss cost to American motorists with their 25 million motor vehicles then registered would come to $866,160,000 per annum. But today, with 65,500,000 registered automobiles, a higher rate of injuries and deaths than in 1930, with higher standards to be considered, higher costs of administration and an even greater claim-consciousness,[50] those figures would be immeasurably increased. Professor Glenn A. McCleary's article on the peculiar type of the "last clear chance" doctrine in Missouri[51] includes a chart[52] which demonstrates that Missouri automobile liability insurance rates are considerably higher than those of other states on a comparable basis. Professor McCleary attributes this to the increased responsibility imposed by Missouri law under its type of humanitarian doctrine. Recently, an insurance expert expressed his view on this point and concluded that, if damages in automobile accidents were to be paid regardless of fault, the cost of such insurance would be "well-nigh prohibitive" and would "sharply limit its sale."[53] It can hardly be doubted that, if liability without fault were adopted for all recoveries in personal injury cases caused by accident, the cost would be even more prohibitive.

The Fault Principle and Its Exceptions

From what has been said above, this writer draws the conclusion that enterprise liability does not seem the alternative to be adopted in preference to our present system of fault liability and that it is wiser to maintain the latter as a rule and depart from it in favor of strict liability only in the relatively limited area in which exceptions to it are felt to be in the interest of justice. Perhaps we have fought the "struggle between an injurer's and an injured's law of tort"[54] within a law of fault liability simply because most of us still feel that, as a rule, a person should not be held liable for something "he did not do." As one writer put it: "The impulse to relieve the innocent is one which we cherish as a part of our emotional adulthood, and we are not likely to surrender it easily."[55]

As indicated above,[56] the concept of "fault" never was synonymous with "moral blame" and whatever moral censure there was has been further diluted in the law of negligence, so that today it has practically nothing to do with morally reprehensible conduct. It means only that we had to establish a line, more or less

[47]Friedmann, *supra* note 15, at 264.

[48]Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Prob. 219, 239 (1953).

[49]James, *supra* note 6, at 552.

[50]Lilly, Compulsory Automobile Insurance, Compulsory Compensation for Motor Vehicle Injuries and Motor Vehicle Financial Responsibility Laws, Association of Casualty and Surety Executives, p. 22 (1930, as reprinted 1932).

[51]McCleary, *The Bases of the Humanitarian Doctrine Reexamined*, 5 Mo. L. Rev. 56 (1940).

[52]*Id.* at 87.

[53]DesChamps, *Coverage for Innocent Victim Pays Off*, 1956 Ins. L.J. 722-23.

[54]Ehrenzweig, *op. cit. supra* note 19, at 13.

[55]Malone, *supra* note 31, at 16.

[56]*Supra* note 3.

arbitrary and certainly highly flexible according to existing circumstances, which we called the "conduct of the reasonably prudent man." One who fell below that line became liable, even though we recognized that anyone of us might drop below it at any time, simply because we are human beings and hence fallible. In this fashion "the defendant's fault provides the law with a basis for compensating the plaintiff"[57] for defendant's harm-causing conduct which, in the court's opinion, could have been avoided if the standard of care of the reasonable man had been observed. On the other hand, if such standard *was* in fact observed, then recovery is, generally speaking, denied.

However, just as many other rules, this rule, too, had to be modified by exceptions as time went on, particularly with the development of our mechanized age. The conduct of human affairs became more and more extensive and less and less personal. There is no denying that ours is a far cry from the "horse and buggy" age. But there are certain immutables which do not, or should not, change along with the change of times. The sense of human justice is one of them. True, with the change of concepts, the law, too, had to be adjusted to the new concepts. However, that cannot mean that we ought to adopt a new system which is entirely foreign to our basic thinking, such as the imposition of liability regardless of fault on one group of society merely because of one type of activity which that particular group pursues, while the rest of society lives under entirely different rules.[58] The imposition of different rules can be justified only if the manner in which the activity is pursued is different from the manner in which the individual member of society as a whole is expected to conduct his business. That is why section 520 of the *Restatement of Torts* restricts the rule of *Rylands v. Fletcher*[59] in its original form and excludes "common usage" from the application of its "ultra-hazardous activity" standard, since, if a large segment of society is engaged in such an activity, the hazard involved becomes one of the hazards of daily living common to all, making the imposition of a special type of liability upon a particular actor unnecessary and unjust.[60]

Thus imposition of strict liability appears in various forms as an exception to the fault principle. Among the persons on whom such strict liability has been imposed by statute or by the courts are, for example, the keepers of animals which stray onto the land of others or of wild animals, persons who engage in an activity which is highly dangerous to others and, at the same time, abnormal in the community, such as the storing of explosives in thickly settled communities, blasting and nuisances, such as smoke, dust, bad odors, noxious gases and the like from industrial enterprises, all obviously related to the cases following *Rylands v. Fletcher*[61] and, of course the employer under workmen's compensation.

It would seem that these heterogeneous types of strict liability are not based on one comprehensive theory, but are justified by the high degree of harm the activities involved are likely to produce and the generally unusual circumstances under which they take place. However, it is submitted that a common denominator might be found which may explain their rationale. This is not to say that the courts and legislatures have consciously adopted the reasoning discussed below. Yet, such reasoning may have led to the establishment of strict liability in such instances as those used as examples above.

The Element of Control

The influence of the element of control upon strict liability might be explained in the following fashion: Society says to the individual: "You are the master of your activities. You are expected

[57] Jaffe, *supra* note 48, at 221.

[58] "It is dubious social policy to single out a particular group in society and make its members or some of its members bear the cost of what may be a very commendable reform, while everyone else in society operates under an entirely different legal doctrine and philosophy." Plant, *supra* note 46, at 948.

[59] 1868 L.R. 3 H.L. 330.

[60] "The reason would appear to be that if the activity is one carried on by a large proportion of persons in the community, the incidence of harm and the incidence of responsibility are so nearly coextensive that nothing would be gained by imposing strict liability. Unless there is a special danger created by a small segment at the expense of the general public, absolute liability would merely substitute a risk of liability for a risk of loss. This interpretation of the common usage test is borne out by the ordinary refusal to apply absolute liability in cases of accidents involving automobiles or household plumbing." Note, 61 Harv. L. Rev. 515, 520 (1948).

[61] Prosser, 337.

to be in control of those activities. As long as you are 'at the controls' we shall expect you to act with the care of any reasonably prudent man under the circumstances, so as to avoid harm to others. If you exercise such care, you will not be held liable. However, if, for certain reasons, control of the activity which you set in motion is not in your own hands, we shall be unable to apply such a standard of care to you, because there can be no standard of care in the absence of control. Hence, we shall hold you liable regardless of your fault." What are the circumstances under which such control is absent?

1. Where control cannot be exercised
(a) because of the nature of the instrumentality itself (wild animal, dynamite, etc.) or
(b) because of the complexity of the activity involved which makes internal control of the various stages of which it is made up impossible (industrial enterprises subject to workmen's compensation).
2. Where control has been delegated to others.

It should be pointed out that "control" as used in the doctrine of *res ipsa loquitur* has acquired a connotation different from the one used here. The doctrine becomes inoperative when control ends, which means that the inference of defendant's liability disappears. This, in turn, means that, under those circumstances, he is not expected to be "at the controls" any more, since someone else has taken over entirely or partially. On the other hand, the word as used in this discussion implies that the defendant *should be* in control but is not and, as a result, is saddled with liability regardless of fault. Dean Prosser has pointed out the inadequacy of the use of the word "control" in connection with the doctrine of *res ipsa loquitur* and suggests that it should be replaced by saying merely "that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."[92]

It seems that impossibility of control is the real basis of the definition of an ultrahazardous activity used by the *Restatement of Torts*: "An activity may be ultrahazardous because of the instrumentality which is used in carrying it on, the nature of the subject matter with which it deals or the condition which it creates."[93] In rejecting the rule of *Rylands v. Fletcher*, Judge Williams said: "Even if the rule stated were a just one . . . it should be applied with careful discrimination to things which, like grass, spread slowly and are subject to more or less control."[94]

It should be kept in mind, of course, that sometimes circumstances will determine whether or not control can be exercised in such manner as to prevent harm. Thus it will become important, for example, in what location blasting operations are conducted, *i.e.*, whether in populated areas or in remote places,[95] just as the question as to whether control can be exercised over an animal will depend on the locality in which the animal is to be controlled. Thus Prosser reminds us that in Burma an elephant is regarded as a safe, domesticated animal.[96]

Again, in the case of industrial workers protected by workmen's compensation, absence of direct control is the striking element. "Prior to 1900 the owner of a plant usually operated it, was regularly in the plant, and generally felt a sense of responsibility toward his employees. The 'trust' movement introduced the absentee owner, with resulting decline in sense of responsibility. Processes were speeded up, greater energy was used to operate heavier machines, and operations became steadily more dangerous."[97] We witness a "vast aggregation of machinery which the individual workman can neither comprehend nor *control* [emphasis added]."[98] Obviously, neither can the employer, absentee or resident.

Finally, we reach strict liability where one person has authorized another to act for him, thus delegating direct control of the activity to the other. Liability then is imposed under the doctrine of *respondeat superior*. While it is quite true that the reason for such liability can be found simply in policy considerations, the justification of such policy seems more con-

[92] *Id.* at 206.

[93] Restatement, Torts §520 (b), comment b (1938).
[94] *Gulf, C. & S.F.R. Co. v. Oakes*, 94 Tex. 155, 58 S.W. 999, 52 L.R.A. 293 (1900).
[95] See Prosser, 336, n. 74, citing, among others, *Alonso v. Hills*, 95 Cal. App. 2d 778, 214 P. 2d 50 (1950).
[96] Prosser, 323, n. 87.
[97] Somers and Somers, Workmen's Compensation, 8 (1954).
[98] Downey, Workmen's Compensation, 6-8 (1924).

vincing when viewed within the frame of the theory here developed. Thus he who should pursue his own activity with the care of a reasonable man has chosen to have someone else do it for him. He is liable for the failure of his delegate to live up to the standard of care, not because he exercises a fictitious control over the delegate (which may be an adequate criterion to qualify the delegate as a "servant"), but because he has made it impossible to apply the standard to himself, although it is his activity which his delegate is pursuing. The widest application of this principle is, of course, found in the master's liability for the torts of his servant committed while acting in the course of his employment[69] and extended to agents other than servants[70] and, in some instances, to independent contractors, a development foreseen by Professor Seavey in 1934.[71] Extension of liability for torts of independent contractors is based on various theories, such as negligence in selecting him, or inherently dangerous activities with which the contractor is entrusted, etc. However, the doctrine of nondelegable duty seems the most convincing argument in favor of imposing liability upon the contractee.[72]

In some other instance, in which vicarious liability is imposed, the courts justify their holdings frequently on the ground that liability should exist because the defendant retained control over the delegate and hence the delegate's negligence should be imputed to defendant, particularly in automobile negligence cases, where the owner, by his mere presence in the car, was said to have exercised control.[73] This language seems confusing and the device of imputing the driver's negligence to the owner unnecessary. It appears simpler to base the owner's liability on the theory that, by giving up control of his car to the driver, thus entrusting him with an activity which he himself should have been pursuing, he became strictly liable for the driver's negligence, regardless of the fact that he chose to be a guest in his own car. This reasoning also seems to underly provisions like section 59 of the New York Vehicle and Traffic Law which imposes liability on the owner of an automobile, even though not present in the car, for injuries to third persons caused by the negligence of anyone who operates the car on a public highway with the owner's consent. Likewise, the "family purpose doctrine," under which liability is imposed on the owner of an automobile who permits members of his household to drive it for their own convenience, may be explained in the light of the above control theory.

Liability For Automobile Accidents

While the adoption of "enterprise liability" has been advocated in all areas of damages for personal injuries resulting from accidents, these efforts have been particularly persistent in the field of automobile accident liability. Various compensation plans have been proposed, the merits of which this writer has discussed elsewhere.[74] In essence, they are all based on "liability without fault" and patterned after the so-called Columbia Plan,[75] with the benefits scheduled along the lines of workmen's compensation and the administration entrusted to a compensation board, deriving the funds necessary for compensation from insurance premiums paid on a compulsory basis by all motorists. Most of the plans are "exclusive," which means that the injured person loses his right of recovery in tort against the injurer. No compensation is paid for pain and suffering. For business

[69]Restatement, Agency §219 (1933).

[70]Prosser, 356.

[71]Seavey, *Speculations as to "Respondeat Superior"*, Harvard Legal Essays, 433, 456 (1934). Professor Morris advocates liability of the contractee by saying: ". . . while it is usually desirable that a contractor be ultimately liable for his torts, in general, the contractee should be responsible to third persons," Morris, *The Torts of An Independent Contractor*, 29 Ill. L. Rev. 339, 345 (1934).

[72]The difficulties in establishing when a duty is non-delegable have been pointed out by many writers. For extensive discussions of this and other problems of liability for torts of independent contractors see especially Morris, *supra* note 71, Steffen, *Independent Contractor and the Good Life*, 2 U. Chi. L. Rev. 501 (1935) and Jolowicz, *Liability For Independent Contractors in the English Common Law—A Suggestion*, 9 Stan. L. Rev. 690 (1957). The last named writer suggests two criteria for finding a duty non-delegable: 1. the value of the plaintiff's interest to which damage has been caused and 2. in some cases, the character of the risk created by the activity.

[73]See e.g. *Goochee v. Wagner*, 257 N.Y. 344, 178 N.E. 553 (1931).

[74]See Ryan and Greene, *Pedestrianism: A Strange Philosophy*, 42 A.B.A.J. 117, 183 (1956).

[75]Report by The Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (1932).

and professional men, profits take the place of wages in the calculation of awards. For certain groups of non-wage earners minimum wages are "assumed." These plans, although frequently proposed, have to date been rejected in all jurisdictions, except in the Canadian province of Saskatchewan, where a somewhat modified version of a compensation plan is in operation.

When we apply the control theory developed above to automobile cases, it becomes obvious that none of the conditions for strict liability established under it applies to the liability of the operator of a motor vehicle. Control over the ordinary vehicle is by no means impossible, either by the nature of the instrumentality or by the complexity of the activity. As long as the responsible driver is at the controls, we can apply the standard of the reasonable man to him and hold him liable for falling below it. The driving of an automobile is a matter of common usage.

> This together with the fact that the risk involved in the careful operation of a carefully maintained automobile is slight, is sufficient to prevent their operation from being an ultrahazardous activity. However, the use of an automotive vehicle of such size and weight as to be *incapable of safe control* and to be likely to crush water and gas mains . . . is not as yet a usual means of transportation and, therefore, the use of such an automobile is ultrahazardous [emphasis added].[76]

Nevertheless, one of the most vigorously asserted arguments for all compensation plans is the similarity of their rationale to the principles of workmen's compensation. That the situations are not analogous has been demonstrated previously[77] on the ground that the accident compensable under workmen's compensation arises out of employment, that the insurance cost can be passed on to the consumer, that the loss can be weighed against accident preventing measures and thus induce the introduction of such measures, that there is privity of contract between employer and employee, absent in automobile accident cases, that there is comparative equality of awards under workmen's compensation, based on generally similar wage scales, which, of course, does not apply in automobile cases, etc. A recent study prepared by the New York Temporary Commission on the Courts points, moreover, to the difference in the philosophical justification of compensating an employee regardless of anyone's fault as compared to compensating a stranger if injured through his own negligence, to the absence of a real yardstick for measuring compensation of children, housewives and students, and to the willingness of an employer to satisfy his employee by payment of a contestable claim, in order to promote "good will," which would be totally absent in automobile cases.[78]

But if we assume that there is sufficient analogy in these two situations, it would seem advisable, before adapting the principles of workmen's compensation to a new field of application, to examine whether the system of workmen's compensation, as practised at the present time, offers sufficient inducements to such a wholesale adoption. Only a few questions can be raised within the framework of this article to illustrate the difficulties encountered in the present administration of workmen's compensation, which would be multiplied if such a plan were extended to automobile accidents.

It has been said that under workmen's compensation "the payments for maiming are much, much less than in a negligence action."[79] In support of this statement the author of the cited article reminds us that in *Affolder v. New York C. & St. L.R.R.*[80] the plaintiff was awarded $80,000 in a court action for the loss of one leg, while under the New York compensa-

[76]Carter, J. in *Luthringer v. Moore,* 31 Cal. 2d 489, 498, 499, 190 P. 2d 1, 7 (1948).

[77]Ryan and Greene, *supra* note 74.

[78]The Temporary Commission on the Courts, In Re a Compensation Plan for Automobile Negligence Cases, 65, 68 (August 1956). This has also been stressed recently in these words: "Even if the analogy between industrial and vehicular accidents is a true one, certain basic objections to such a plan still remain. In the first place, while a schedule of benefit payments could be satisfactorily worked out for wage-earners, a real problem would exist in creating a suitable schedule for those victims who were self-employed or in the executive class. Any suggestion that this problem can be remedied by leaving the victim a tort remedy over and above the compensation remedy [Grad. *Recent Developments in Automobile Accident Compensation,* 50 Colum. L. Rev. 300, 329 (1950)] would be no solution at all, for it would only serve to superimpose an administrative process upon an already overly congested court system." Note, 32 N.Y.U.L. Rev. 147, 155, n. 44 (1957).

[79]Jaffe, *supra* note 48, at 236.

[80]339 U.S. 96 (1950).

tion statute, which is one of the most liberal ones, he would have received $17,280, in Indiana, where the injury occurred, $11,000 and in Vermont $4,250. A recent study by the Institute of Judicial Administration tells us: "The fundamental concept of workmen's compensation is speedy, simple and inexpensive justice. . . . However, complex procedures have developed and over 100,000 litigated cases arise in this field each year."[81] This is also reflected in Justice Murphy's statement that certain workmen's compensation terms are "deceptively simple and litigiously prolific."[82] Thus workmen's compensation has come under heavy attack recently, mainly because of the inadequacy of its benefits, the high administrative expense and the excessive litigation of the compensation system.[83] As to the last mentioned criticism, it has been said that the amount of litigation in workmen's compensation represents "a great gap between theory and practice."[84] Is there any reason to assume that these disadvantages will be lessened rather than increased in automobile accident compensation? The above cited study by the Institute of Judicial Administration also reaches the conclusion that "neither workmen's compensation, nor a similar agency for automobile tort cases will eliminate the need for representation by counsel, despite the intentions of the drafters of the statute,"[85] and that "the expert testimony problems faced by parties in automobile tort litigation have not been solved by the majority of workmen's compensation agencies."[86] How far from offering a wholesale solution the adoption of compensation schedules is, is illustrated by the statement that, as far as Litigation over the degree of disability is concerned, which "the fathers of compensation laws thought they had settled by benefit formulas and schedules," such formulas cannot determine these medico-legal questions.[87] Not only do the workmen's compensation laws fail to avoid litigation, but, under some interpretations of their provisions, the employer becomes liable for amounts beyond the established schedules. Thus, he may be strictly liable for the scheduled benefits in case of direct action by the employee, but remain liable in tort beyond such benefits if the action is brought by a third party, a result contrary to the basic idea of "exclusiveness" of the remedy against him under the workmen's compensation laws. This situation was presented in *Westchester Lighting Co. v. Westchester County Small Estates*,[88] where defendant's employees negligently broke a gas pipe maintained by the plaintiff in a public highway, as the result of which gas escaped and killed one of the defendant's employees in the course of his employment. In an action by decedent's administratrix judgment was recovered against the plaintiff who now brought action against defendant for reimbursement of the sums he had to pay in the previous action, including costs. Defendant's contention that he, having taken out insurance under workmen's compensation, was liable only for the scheduled benefits, was held not to constitute a good defense. Thus, because the money passed through the hands of a third party, the employer became liable beyond the compensation schedule. This case has been followed consistently by a long line of subsequent cases. Translated into automobile compensation, the following would result: Assume that automobile drivers A and B collide on a grade crossing. A is severely injured and brings an action against the railroad, alleging the latter's negligence in maintaining the crossing. A recovers a substantial sum against the railroad which considerably exceeds what he could have recovered under automobile compensation schedules (regardless of fault). The railroad, having paid A, now brings an action against B, claiming that it was B's negligence which caused the accident and the loss of money to the railroad. Under the *Westchester* case the fact that B was insured under automobile accident compensation, hence only liable under compensation schedules, would be no bar to plaintiff's recovery, since, as in the

[81] Institute of Judicial Administration, Administrative Boards for Automobile Tort Cases—Workmen's Compensation Compared (Delay and Congestion—Suggested Remedies Series No. 8) (May 15, 1956) p. 16.

[82] *Cardillo v. Liberty Mutual Insurance Co.*, 330 U. S. 469, 479 (1947).

[83] Kulp, Casualty Insurance 134 (3d ed. 1956).

[84] J. Reid, U. S. Bureau of Labor Standards, Bull. 172, p. 157.

[85] Institute of Judicial Administration, *supra* note 81, at 17.

[86] *Id.* at 19.

[87] Somers and Somers, *supra* note 67, at 183.

[88] 278 N.Y. 175, 15 N.E. 2d 567 (1938).

Westchester case, the action is not brought under subrogation, but is based on an independent cause of action. Thus, insurance under the compensation plan would not protect B and he would still be liable under the common law principle of negligence. In a number of cases, then, the victim would still resort to the common law, in order to get a higher award, even though he would have to do it by way of a third party action, and thus obtain indirectly what he could not get directly. The results as to court congestion would be similar as in the case of adoption of "non-exclusive" compensation systems.[89]

This writer pointed out elsewhere[90] that the adoption of a compensation board for automobile accidents would entail the establishment of a very sizeable apparatus, with a full complement of law-trained personnel, adjusters, etc. to handle the expected large number of claims and determine such issues as casual relationship, character and extent of injuries, etc. It must also be remembered that virtually *every* accident would result in a claim before the compensation board and would have to be processed by it, whereas at the present time a majority of claims is settled before ever reaching the courts. But the most important objection to the determination of these claims by an administrative board lies in the person on whose judgment the award depends. Insistence on judicial review of administrative adjudications in this country is prompted by the greater confidence we place in our judges as compared to administrative functionaries. We have, therefore, contrary to the British system, retained the principle of judicial review in workmen's compensation cases. Thus Dean Arthur Larson concluded in a recent article[91] that the British Commissioner of Insurance and his administrators, even though lawyers, are far more inclined to be bound by the letter of the statute or regulation they administer than a judge whose easy familiarity with the law and its administration enables him to cut through its wording and reach its intent and policy. It is to be expected that determination in the usually far more serious automobile accident cases will require an even greater skill and experience from the awarding body which, therefore, should not be left without judicial supervision, even at the initial stage of proceedings. If, then, we are to allow judicial review of decisions made by the administrative board, as we obviously must, and let the plaintiff sue on principles of tort liability in the courts, either whenever he alleges any negligence, as under the Saskatchewan plan, or criminal negligence or willful or wanton acts, as suggested in some plans, we shall only add an overcongested administrative tribunal to overcongested courts.

As pointed out above, it is extremely difficult to estimate the cost of a compensation plan for physical injuries in general and those resulting from automobile accidents in particular. But, in addition to a reference to the estimates noted before,[92] let us consider merely a few figures from recent sources. In the 1956 study prepared for the New York Temporary Commission on the Courts it was estimated that, not counting expenses connected with the physical apparatus required, such as buildings, personnel, etc., and on the basis of only a 40 per cent cost of administration, Automobile Accident Compensation would, in the State of New York alone, cost $277,735,900 a year, with benefits computed on the basis of workmen's compensation schedules.[93] Of this amount approximately $195,525,640 would be available for actual compensation. However, operating expenses of workmen's compensation are much nearer to 48 per cent of all costs and have even been estimated in some states at 56.5 per cent.[94] The insurer's administrative expenses, measured by workmen's compensation experience, would certainly be no lower in an automobile compensation scheme than they are for automobile

[89]See Note, *supra* note 78. See also Illinois Legislative Council, Motor Vehicle Accident Compensation, Publication 128 at page 33 (Nov. 1956), which concludes: "Moreover, unless adoption of such a plan of compensation were accompanied by substantially complete elimination of rights to sue under traditional negligence concepts, there would still be very substantial burdens on the courts and also a large volume of post-accident investigation and compromise such as now exists."

[90]Ryan and Greene, *supra* note 74, at 121.

[91]Larson, *The Myth of Administrative Generosity: A Lesson From British Experience*, 40 A.B.A.J. 195, 262 (1954).

[92]Lilly, *op. cit. supra* note 50; McCleary, *supra* note 50; DesChamps, *supra* note 53.

[93]The Temporary Commission on the Courts, *supra* note 78 at 122.

[94]Somers and Somers, *op. cit. supra* note 67, at 194, 195.

liability.[95] "The hopes of compensation supporters of sharp decreases are based principally on expectations of greatly reduced litigation, which in view of the recent attack on workmen's compensation . . . seem unduly optimistic."[96] But, even if such expense were actually incurred, would this assure an adequate compensation of the victim to which he is entitled under our present system? Doubts in this respect are not allayed when we realize that the estimated cost of wage losses and medical expenses resulting from work injuries amounted in 1955 to $1,370,000,000, for which compensation paid amounted to only $920,000,000.[97] The same costs of automobile accident injuries in the same year were estimated at $1,470,000,000.[98] A compensation in the same proportions as indicated above for work accidents would hardly be considered fair and adequate.

The automobile accident compensation system in effect in Saskatchewan, Canada, is the only compensation plan adopted in the Americas.[99] The plan is of the "non-exclusive" type, *i.e.*, it reserves to the injured party, in addition to his right to compensation, the right of action in tort, if he alleges negligence on the part of the injurer, but the amount of the compensation award must be credited on the judgment. The plan "is part of a much larger program of nationalization which includes a half dozen basic industries."[100] The same act which created the compensation scheme also established a monopolistic state insurance fund administered by the Saskatchewan Government Insurance Office, to which every driver in the province must contribute. Premiums are extremely low. The main reasons for this fact have been found to be low inherent hazards, low administrative expense and low benefits as well as the circumstance that a compulsory hospitalization insurance system pays all expenses of hospitalization resulting from automobile accidents.[101] The province is a thinly settled plain with a population density of one twentieth of that of Wisconsin. During most of the winter 60 per cent of Saskatchewan cars are totally immobilized because of impassable roads. The extent of the benefits is illustrated by such rates as $4,000 for the loss of both hands, both feet or both eyes, $2,700 for the loss of one arm or one leg, $2,000 for the loss of one hand or one foot or one eye, etc. For medical services "supplemental grants" up to an aggregate of $600 are given.[102] In 1949 an average payment of $166 per person is reported.[103] It seems clear that these conditions and rates are no basis for an analogy to situations existing in the United States.[104] It has justly been said that writers who advocate the adoption of the Saskatchewan plan in the United States overlook the fact that "Americans think in comparatively extravagant terms" and that recoveries in this country are large, because of our greater wealth as compared to other countries.[105] The same writer also reminds us that the "ethical sense—or the sense of caution—becomes somewhat dulled in the presence of an impersonal insurance fund"[106] thus enhancing the claim-consciousness to which our people are prone. One writer reaches the conclusion that "when and if the people of the United States decide for automobile compensation, it will probably be for reasons quite other than those to be drawn from the experience of the Saskatchewan precedent."[107]

Reforms of our present system are needed to assure fair, adequate and speedy compensation to all innocent victims of injuries to person and property caused by accidents. As has been pointed out in a previous article,[108] steps toward such improvements have been recommended and have partly been actually taken. One of the measures mentioned was the action by insurance companies in instituting special "endorsements" to the holders of liability insurance policies, extending cov-

[95]Kulp, *op. cit. supra* note 83, at 225.
[96]*Ibid.*
[97]National Safety Council, Accident Facts (1956) and Accident Facts (1957), p. 13, 39.
[98]National Safety Council, Accident Facts (1956) p. 13.
[99]For details of the plan see especially Marx, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 Ohio St. L.J. 134, 141 (1954) and Marx, *"Motorism", Not "Pedestrianism": Compensation for the Automobile's Victims*, 42 A.B.A.J. 421, 425 (1956).
[100]Kulp, *op. cit. supra* note 83, at 226.
[101]*Id.* at 227.
[102]Saskatchewan Automobile Accident Insurance Act 1947, §17, Schedule A.
[103]The Temporary Commission on the Courts, *supra* note 78, at 39.
[104]Kulp, *op. cit. supra* note 83, at 226.
[105]Jaffe, *supra* note 48, at 238 .
[106]*Id.* at 239.
[107]Kulp, *op. cit. supra* note 83, at 227.
[108]Ryan and Greene, *supra* note 74, at 186-87.

erage to bodily injuries to an insured caused by an uninsured motorist in limits of $10,000 for each person, subject to a maximum of $20,000 per accident. This coverage extends also to guests of the insured and to the insured and members of his family as pedestrians. Judge Marx quotes one sample of such an endorsement of a mutual insurance company in his recent article[109] which shows that the insurer agreed to pay the compensation *without regard to fault* where the automobile causing the damage was uninsured. Since that article was written, the mutual insurance companies have abandoned this form of endorsement and have, beginning January 30, 1957, reverted to the type of endorsement adopted by the stock companies. The endorsement now contains the clause: ". . . provided, for the purposes of this endorsement, determination as to whether the insured . . . is legally entitled to recover such damages . . . shall be made by agreement between the insured and the company or . . . by arbitration." Thus it seems that their experience with liability regardless of fault of the insured has not commended the continuance of this system to the insurance companies.

In its recommendations dated February 4, 1957, the New York Temporary Commission on the Courts emphatically rejected the adoption of a compensation plan for automobile accident cases. It stated that "automobile cases are, in fact, less than half of total Supreme Court business and in a county like New York County only about 30 per cent. Thus the impact of a compensation plan on the courts would not be as great as frequently claimed. . . ." The Commission bases its rejection of all proposals for such compensation plans on the following reasons: increased costs to automobile owners and the public, the elimination of fault as a basis of liability, the lack of any legal relationship between the usual parties to accidents (as compared to workmen's compensation cases), the probable inadequacy of payments provided if every injury is to be compensated, the substantial increase in number of claims and the likelihood that delay would simply be transferred to the administrative agency.[110] The commission also stressed its belief that "all such controversies whether caused by motor vehicles or otherwise should be dealt with in the courts and that the machinery of the administration of justice can be so improved as to deal adequately with the justiiable matters."[111] Fundamental remedies were suggested regarding revision and simplification of the structure of the courts[112] and revision and modernization of practice and procedure of the courts.[113] Before those sweeping changes can be adopted, however, calendar congestion is being reduced by devices currently in use, such as intercourt transfer of judges and cases,[114] the highly successful pre-trial hearings,[115] impartial medical panels[116] and special arbitration proceedings worked out by insurance carriers.[117] In addition, the commission has recommended an increase in the number of supreme court justices,[118] the appointment of pre-trial masters,[119] the adoption of legislation establishing the principle of comparative negligence on an experimental basis,[120] a greater uniformity in filing fees and cost provisions with the aim of deterring attorneys from bringing actions in a higher court which should have been brought in a lower court[121] and some measures to force expansion of the trial bar by limiting the number of cases any attorney can hold pending while otherwise engaged in trial.[122]

A few other recent proposals, which suggest remedies while retaining our principle of tort liability, should be mentioned, without discussing their merits within the framework of this article.

Justice Samuel Hofstadter of the New York Supreme Court suggests the assignment of automobile accident cases to a special court, composed of one jurist, one layman and one physician, and the adop-

[109] Marx, *supra* note 99 at 424-25.

[110] 1957 Report of the Temporary Commission on the Courts, IV, Recommendations Respecting Calendar Congestion and Delay, Legislative Document (1957) No. 6 (c), 45.

[111] *Id.* at 46.

[112] 1957 Report of the Temporary Commission on the Courts, I, A Recommendation For a Simplified State-wide Court System (1957).

[113] 1957 Report of the Temporary Commission on the Courts, III First Preliminary Report of the Advisory Committee on Practice and Procedure, Legislative Document (1957) No. 6 (b).

[114] 1957 Report of the Temporary Commission on the Courts, IV, *supra* note 110, at 17-18.

[115] *Id.* at 18.

[116] *Id.* at 19-20.

[117] *Id.* at 20.

[118] *Id.* at 21-24.

[119] *Id.* at 25-38.

[120] *Id.* at 40-41.

[121] *Id.* at 41.

[122] *Id.* at 42-43.

tion of the principle of comparative negligence. In these cases juries will be dispensed with.[123] Mr. Francis H. Patrono, a member of the Pennsylvania bar, suggests to let juries decide the question of liability in personal injury cases, but, after the jury has rendered a verdict for the plaintiff, to refer the case to a board of specialists in forensic medicine which would hold a hearing, at which both sides would be heard, and whose report would then be the basis of a monetary evaluation by the court, which would be guided by certain standards he suggests.[124]

Professors McNiece and Thornton suggested a few years ago the retention of our "existing legal structure plus compulsory insurance, plus, where necessary, state aid to the needy accident victim (the latter without regard to his personal fault)."[125] The first part of this suggestion, *i.e.*, compulsory insurance, has recently been adopted in New York State. It should alleviate some of the problems presented by the uninsured motorist, even though some gaps remain to be filled.[126] It is too soon to tell whether or not the plan will work out satisfactorily.

CONCLUSION

This writer believes that, for the reasons he has tried to develop, it would be inadvisable to discard the tort principles of the American law relating to recovery of damages for personal injuries in favor of compensation plans based on the principle of liability regardless of fault. Everyone agrees that the "first line of defense" against injuries is their prevention. In this respect some excellent suggestions have been made in the direction of proper controls relating to the physical condition of the driver, the increased safety of the vehicle and the stricter enforcement of traffic laws.[127] On the other hand, this writer feels that our present system, when improved along lines similar to those proposed by the New York Temporary Commission on the Courts, will be perfectly adequate to provide for both fair and speedy compensation of victims of accidents which have not been avoided.

[123]Hofstadter, *Alternative Proposal to the Compensation Plan*, 135 N.Y.L.J. nos. 49-51 (March 13, 14 and 15, 1956).

[124]Patrono, *A Proposal for The Reformation of the Trial of Personal Injuries Cases*, 61 Dick. L. Rev. 345 (1957).

[125]McNiece and Thornton, *Is the Law of Negligence Obsolete?*, 26 St. Johns L. Rev. 255, 273 (1952).

[126]Note, *supra* note 78, at 162-65.

[127]McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. Rev. 585, 591-97.

Coverage Arising from the Questions of Permissive Use or Agency*

HOW FAR does coverage extend under the omnibus clause of an automobile liability policy? Can the first permittee extend permission to drive to a third person so as to make him a second permittee covered under the automobile policy? Do the rules of law pertaining to agency or scope of the employment apply in such a situation so as to determine coverage?

The so-called omnibus clause of the standard automobile liability insurance policy under which these questions frequently arise is as follows:

> "The unqualified word 'insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named insured and, except where specifically stated to the contrary also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured."

In a frequently cited case, *Aetna Casualty & Surety Company vs. DeMaison,* (U.S.D.C., Penn.) (1953) 114 F. Supp. 106, reversed 213 F. 2d 826 (1954), the circumstances were that Emil Schick, Sr. was the owner of an insured automobile and had living with him an unmarried son Emil Schick, Jr. The car was kept in a garage at the rear of the house and the keys were kept in a kitchen drawer. The son used the car once or twice a week but whenever he desired to use it he would ask his father for permission. The father would grant the requested permission unless he needed the car himself. When the son used the car he furnished gasoline and oil for it. On the occasion in question the son asked for permission to use the car and it was granted. He was asked where he was going and the son stated that he was going to the York Town Theatre in Jenkintown. In fact the son took the car and used it to drive to Messina's Inn in Ardsley. While there Emil, Jr. was with a group of friends and it was decided that they would go to a diner in Willow Grove which was three or four miles away. One, Mrs. DeMaison, had wanted to drive the car and Emil, Jr. consented. While Mrs. DeMaison was driving with Emil, Jr. in the car there was an accident.

In this situation the United States Court of Appeals for the Third Circuit held that there are certain principles generally accepted, namely, that one to whom the insured has given permission to use the car has no authority to delegate such permission to another so as to make the latter an additional insured; but the insured's conduct, or the nature or scope of the permission granted by him, may be such as to indicate permission to such other. However, mere permission to use the automobile does not in itself, by implication, include an authority to delegate such permission to a third person. The court held that the circumstances did not disclose that there was any express or implied permission given by Emil Schick, Sr. to Mrs. DeMaison to drive the car and that there was no express or implied permission from Emil, Sr. to Emil, Jr. to delegate his own permission to drive to Mrs. DeMaison or anyone else, and therefore Mrs. DeMaison was not an additional insured under the policy.

Authorities have been divided on this point. It has been said in some states that the bailee of an automobile cannot permit a third person to operate it so as to bring the third person within coverage of the policy. For example it has been so said to be the rule in Ohio, *Fox v. Crawford,* 50 O. L. Abs. 533, 80 N. E. 2d 187, (Court of Appeals, Ohio); *West v. McNamara,* 159 Ohio St., 187, 111 N. E. 2d 909; *General Casualty Co. of Amer. v. Woodby* (Tennessee, 1956), 238 F. 2d 452; *United Services Auto Assn. v. Preferred Acc.,* (Oklahoma), 190 F. 2d 404.

On the other hand it has been said that where the first permittee has the

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right to use the car without any restrictions he has the right to allow others to use it and thereby bring them under the policy. For example it is so held in Alabama, *Penn. Threshermen and Farm Mut. Cas. Co. v. Crapet,* (1952) 199 F. 2d 850; Illinois, *Standard Acc. Ins. Co. v. New Amsterdam Cas. Co.* (1957), 249 F. 2d 847, 12 Auto Cases 2d 1229, (7 Cir.); California, *State Farm Mut. Auto Ins. Co. v. Porter,* (1950), 186 F. 2d 834, (9 Cir.).

The *DeMaison* rule is sometimes circumscribed or limited without being actually denied. For example where the insured left his car with his girl friend before going into service in the marines and where there was nothing said about lending it to anyone else, and the insured merely said that he was leaving it with her but did not want to come back and find it wrecked, it was held that the girl was more than a bailee. She had general authority over the use and operation of the car during the insured's absence. She therefore stood in the place of the insured and could permit its use by others under appropriate circumstances. *Robinson's v. Fidelity & Cas. Co. of N. Y.* 57 S. E. 2d 93, 190 Va. 368. Also in *Utica Mutual v. Rollaston,* (1957) 246 F. 2d 105, (4 Cir.) the circumstances were that an automobile service agency provided its service manager with a car. According to the manager's contract he was "furnished transportation without gasoline." It was held that if an insured automobile is left by the owner with someone for general use and he in turn permits its use by another, the use is deemed to be with the permission of the owner.

The courts are in agreement, however, that if the insured specifically instructs the first permittee that he is not to let anyone else drive, the first permittee has no authority to extend permission so as to make a second permittee covered under the policy. No case has been found where permission may be implied where the uncontradicted evidence is that it was forbidden. *Farmer v. Fidelity Cas. Co. of N. Y.,* 249 F. 2d 185 (1957) (4 Cir.); *Carlton v. State Farm Mutual Auto Ins. Co.,* 309 P. 2d 286, Okla. (1957); *Oklahoma Farm Bureau Mutual Ins. Co. v. Bryant,* 12 Auto Cases 2d 680, (1957), Okla.; *Presuda v. General Cas. Co. of Amer.,* 74 N. W. 2d 777, Wisc., (1956); *Young v. State Farm Mut. Auto Ins. Co.,* (1957) 4 Cir. 244 F. 2d 333.

Some courts have ruled contrary to the *DeMaison* case that the first permittee does have authority to delegate permission to a second permittee where it is done in furtherance of the purpose of the original permittee in taking the car. It is said that one to whom the named insured has given initial permission to use the automobile for a specific purpose has implied authority to permit the use of the auto by another where in doing so, the second permittee uses the car for some purpose for which the original permission was given, the original permittee being in the car with him. *Standard Acc. & Ins. Co. v. New Amsterdam Cas.* (1957) 249 F. 2d 847, 7 Cir.; *Boudreaux v. Eagle Motors,* 70 So. 2d 741, La.; *Harrison v. Carroll,* 139 F. 2d 427, (1944) Va.; *Norris v. Pacific Indemnity Co.,* 247 F. 2d 39 Cal. 2d 420.

No doubt the omnibus clause, like other clauses of the policy, must be construed liberally in favor of the insured. *Chalfield v. Farm Bureau Mut. Auto,* (1953) 208 F. 2d 250, 4 Cir. *Amer. Auto Ins. Co. v. Fulcher,* (1953) 201 F. 2d 751. Therefore, other courts have gone even further and found that the unrestricted right to use the automobile includes the power to delegate authority to a second permittee, *Pennsylvania Threshermen and Farm Mut. Cas. Co. v. Crapet,* (1952) 199 F. 2d 850 (Alabama); *Robinson's v. Fidelity & Cas. Co. of N. Y.,* 57 S. E. 2d 93, 190 Va. 368; *Standard Acc. Ins. Co. v. New Amsterdam Cas. Co.,* (1957) 249 F. 2d 847, 12 Auto Cases 2d 1229 (7 Cir.); *State Farm Mut. Auto Ins. v. Porter,* 186 F. 2d 834, (9 Cir.); *Utica Mut. v. Rollaston,* (1957) 246 F. 2d 105, (4 Cir.).

In the absence of any universally accepted rule as to whether the first permittee does or does not have authority to grant permission to another, the question will ordinarily be treated as a question of fact. Assuming that there is no specific prohibition against use by another and that a permittee of a permittee must have some express or implied authority from the named assured, the question thus becomes a question of fact for the jury. *Amer. Auto Ins. Co. v. Fulcher,* (1953) 201 F. 2d 751; *West v. McNamara,* 159 Ohio St., 187, 111 N. E.

2d 909. Even though the first permittee has no authority to delegate such permission to another so as to extend coverage under the policy, the insured's conduct or the nature or the scope of the permission originally granted may be such as to indicate permission to a second permittee. *Holthe v. Iskowitz,* 197 P. 2d 999, 31 Wash. 2d 533 (1948).

Permission may be implied, for example, where the named insured gave his daughter permission to use his automobile on a business trip and the insured knew that his daughter was to be accompanied on the trip by a friend. Where the daughter asked the friend to drive, permission was fairly implied. *Brooks v. Delta Casualty Co.,* 82 So. 2d 55, (La.), 1955. Where the insured has knowledge that his son's school friends drive his car and the insured does not object, consent may be implied. *Menn v. Mutual Auto Ins. Co. of Town of Herman,* 64 N. W. 2d 195, (Wis.), (1954).

Where an adult brother purchases an automobile for the use of a minor brother, permission, even though a question of fact, is fairly implied in the absence of any other evidence on the point from the nature of the general purpose for which the auto was turned over to him. *Indiana Lumbermans Mut. Ins. Co. v. Janes,* 230 F. 2d 500, (1956).

The law of agency and of scope of the employment has no application to coverage under the omnibus clause. Suppose an employee gets permission to take his employer's truck to go on some business for his employer and, instead of that, the employee goes off on a pleasure trip of his own and is involved in an accident. The employer would not be liable at law because at the time of the accident the employee was not in the furtherance of his master's business, but the employee is nonetheless an insured under the omnibus clause. The rules of agency have no bearing on the case. The liability of the insurance company is not based on any employment relation, but only on the contract between the insured and the insurance company. Once the initial permission to the employee to take the truck has been granted, he becomes an insured and there is no question on that point left for the jury. *Arnold Admr. v. State Farm Mut. Auto Ins.,* 260 F. 2d 161, 7 Cir. (Ind.), 13 Auto Cases 786, (1958); *Kiefer Admr. v. Gosso,* (Mich.), 14 Auto Cases 2d 1148, (1958); *Greene v. St. Paul Mercury Ind. Co.,* (1958) 13 Auto Cases 2d 576, (Wash.). Whether or not an employee deviates from his employment is immaterial in determining the insured's liability under the omnibus clause. Whether such employee has authority to grant permission for use of the vehicle to a second permittee depends upon the application of the omnibus clause to the circumstances of the original permission and not the employment relation. *Longwell v. Mass. Bonding Ins. Co.,* 63 So. 2d 440, (La.), (1953). If the employee has exceeded permission under the omnibus clause he is not covered under the policy even though he may be an employee of the insured. *Boyd v. Liberty Mutual Ins. Co.,* (1956) (C.A.D.C.), 232 F. 2d 364.

The rule of the *DeMaison* case that permission to operate an automobile does not by itself carry with it permission to extend that permission to another still obtains generally, but coverage of a second permittee may be inferred from the general authority originally delegated or left to the jury to be found as permission implied from the circumstances of the case.

The question may arise as to whether or not the new so-called "Family" automobile policy has made any change in the above requirements for the extension of permission to a second permittee. The relevant provision in the "Family" policy is as follows:

> "The following are insured under part I:
>
> (a) with respect to the owned automobile,
>
> (1) the named insured and any resident of the same household,
>
> (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;".

The courts have not made any reference to the "Family" policy when considering extension of permission to a second permittee. It is submitted, however, that a son, resident in the insured's household, would be an "insured" instead of merely a permittee as under the old policy, but, according to the above wording of the "Family" policy, a second permittee would still have to have permission from the named insured either express or implied, in order to have the benefit of coverage under the policy.

Jury Verdicts—Los Angeles Metropolitan Area

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THESE figures are taken from the Pat Taylor Jury Service in the Los Angeles Metropolitan Area, which service provides a weekly summary to subscribers of all jury cases. The information is not always complete and, of course, is subject to interpretation. Another person might come up with different figures and the author claims no exactness whatever.

The figures on the rear-end whiplash cases denote the number of verdicts for injured plaintiffs, and not the number of cases. There are many multiple plaintiff cases contained in the reports.

Some of my conclusions, for what they are worth, are:

1. Fewer contested cases were tried in 1958 than 1957.
2. Pedestrians in crosswalks, etc., did much better than in 1957.
3. Pedestrians outside crosswalks, etc., were not very successful.
4. Infant pedestrians were surprisingly unsuccessful.
5. Only about one-third of fall down plaintiffs recovered.
6. Evidently more rear-end cases are being settled as fewer were tried.
7. The average whiplash verdict is reduced.
8. The average, ordinary whiplash verdict is 1.51 times the specials.

	Verdicts 1957			Verdicts 1958		
	Pltf.	Deft.	Others	Pltf.	Deft.	Others
Contested Liability	273	285	—	222	261	—
Hung Jury			20			28
Non-Suit and Directed Verdict		18			14	
Rear-end—Whiplash (including admitted liability cases)	193	44	—	132	30	—
Admitted liability (not rear-end)	45	—	—	39	1	—
Total Trials	511	347	20	393	306	28
GRAND TOTAL		(878)			(727)	

CONTESTED LIABILITY

	1957		1958	
	Pltf.	Deft.	Pltf.	Deft.
Common carrier passenger	14	14	8	9
Auto—Plaintiff crossing arterial highway	3	3	2	16
Auto—Defendant crossing arterial highway	—	3	9	10
Assault	5	4	2	2
Four way stop	4	3	1	1
Auto—Right angle intersection	31	36	6	14
Plaintiff making left turn	10	11	10	10
Defendant making left turn	6	13	8	8
Dog bite and dog bump	1	1	2	1
Plaintiff Pedestrian in crosswalk or with signal	20	22	27	4
Plaintiff Pedestrian not in crosswalk or with signal	19	15	2	13
Guest cases—Willful misconduct	6	8	4	3
—Intoxication	—	2	1	1
Plaintiff a "passenger" (not guest)	7	2	4	5
Plaintiff minor on bike, skates, infant pedestrian	5	18	1	16
Signals	13	6	12	15
Bottle explosion	2	2	—	—
Beauty shop cases	2	3	2	—
Safe place to work cases	*	*	8	3
FELA	*	*	3	—
RR Crossing	*	*	3	3
Warranty other than food	*	*	1	3
Plaintiff entering street from driveway, shoulder, etc.	*	*	2	4
Jones Act Cases	*	*	1	—
Swimming pool deaths	—	—	—	—
Plaintiff left or U turn same direction (or right)	1	11	—	9
Backing in driveway	5	7	1	1
Fall off horse	1	1	2	1
Defendant right or left turn same direction	14	12	14	6
Landslide cases	—	—	—	—
Attractive nuisance	1	1	1	1
Head on	14	6	12	5
Motorcycle (plaintiff)	2	6	3	3
Falling—sidewalk (O. L. & T.)	7	4	3	6
—waxed floor (O. L. & T.)	2	4	—	2
—other (O. L. & T.)	21	28	11	32
Miscellaneous	50	32	53	45
Malpractice	6	7	2	9
Warranty food	1	—	1	—
	273	285	222	261

*New categories added in 1958.

REAR-END WHIPLASH

	1957			1958		
	Pltf. Verdicts	Average	Amount	Pltf. Verdicts	Average	Amount
	193	$4,038	$779,249	132	$3,436	$453,596
Specials claimed—			$361,816			$268,425
After eliminating exceptional cases involving serious injuries and where the special damages not available:						
Verdicts			$461,773			$339,164
Special damages			322,479			224,193

Comparing verdicts to special damages:

	1957	1958
Special damages or less	51	35
One to two times the specials	59	37
Two to three times the specials	26	17
Over three times the specials	27	26
Defense verdicts	44	30
Exceptional cases and where special damages not given	30	17
TOTAL	237	162

Rear-end cases where liability admitted	58	56

ADMITTED LIABILITY—NOT REAR-END

	1957	1958
Total number of cases tried	**	29
Total number of verdicts	45	40 (including one deft)
Total amount of verdicts	$311,603	$299,016
Total amount of special damages	135,837	73,975
After eliminating exceptional cases involving serious injuries and where the special damages were not available:		
Total amount of verdicts	$148,922	$244,982
Total special damages claimed	96,460	70,206
Comparing verdicts to special damages:		
Special damages or less	5	2
One to two times the special	10	11
Two to three times the specials	6	6
Over three times the specials	15	10
Defense verdicts	—	1
Exceptional cases and where specials not given	9	10
TOTAL	45	40

**Plaintiff verdicts not broken down by actual case in 1957.

Implied Warranties in the Atomic Energy Field*

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FOR THE past several years virtually every discussion on the subject of atomic energy has been prefaced with the generalization that the world today is witnessing the dawn of a major technological revolution in the peaceful uses of atomic energy. It is also generally asserted that the ramifications of this development will dwarf in every respect the Industrial Revolution of the 19th Century, and that the United States will be as momentously affected in this new era as it was 100 years ago.[1] This paper is based upon these assumptions that the peaceful uses of atomic energy will have a very substantial impact upon every phase of human activity and endeavor.

After a period of intense secrecy (1942-1956) devoted to research and development for military purposes and after a further period of strict governmental monopoly in the atomic energy field under the Atomic Energy Act of 1946,[2] the United States government in 1954 officially opened the door to private enterprise, inviting and encouraging industry to participate in the atomic energy program under the Atomic Energy Act of 1954.[3] It is this act which has given official sanction and the first real impetus to widespread non-governmental use of atomic energy materials.

What are some of the realities and potentialities of atomic energy use? This is well summarized in the publication entitled "Atomic Energy Technology For Lawyers":[4]

> "Any account of the peaceful applications of atomic energy is bound to become out-of-date rapidly because of the new discoveries that are being made almost daily. However, the potentialities of atomic energy in industrial, medical, agricultural, and research pursuits already are sufficiently well known to make it clear that atomic energy will play an everincreasing role in society. The peaceful uses presently employed can be classified roughly into three major categories: (1) the use of the fission chain reaction process in reactors for the production of heat, energy and radioactive isotopes; (2) the use of sources of radioactivity where the radioactivity itself is employed for specific purposes; and (3) the use of radioisotopes as a tool or a research instrumentality. Each of these uses, as we shall see, involves certain hazards that may cause injuries to personal and property."

With regard to the first of these uses, reactors, the authors state:

> "To date, the truly dramatic potentialities of the controlled chain reaction in reactors designed to produce electricity have overshadowed many other possible practicable uses. Reactors may be

*Prepared by a sub-committee of the Casualty Insurance Committee, of which G. M. Morrison is chairman. Additional articles dealing with "Problems of Atomic Energy Law" are being prepared by this committee and will appear in subsequent issues of the Journal.

[1]For example, see Editorial, 1 Atomic Energy L. J. (1959), quoting Inaugural Address of American Bar Association President-Elect Rhyne delivered in London on July 30, 1957.

[2]See Dunlavey, "Government Regulation of Atomic Industry", 105 U. Pa. L. Rev. 295 (1957); and Smyth, Atomic Energy for Military Purposes (1946).

[3]68 Stat. 919 (1954), as amended, 42 U.S.C. §2011-2281 (Supp. 11, 1955), as amended, 42 U.S.C.A. §2017 (a), (b) (Supp. 1956).

[4]Stason, Estep & Pierce, Atomic Energy Technology for Lawyers, 40 (1956).

employed to space heat buildings and residences, to propel ships, locomotives, and airplanes, to supply heat in many industrial pursuits such as the manufacture of cement and brick, to produce radioactive and other chemicals, to test materials, to act as blast furnaces in the reduction of ores, to treat diseases, and undoubtedly to accomplish many other tasks that are yet to be envisaged. The imposing array of methods of commercial exploitation of the fission process puts the legal profession on notice that it will within the next decade be required to handle innumerable legal problems involving atomic energy."[5]

As summarized in this same publication, among the many uses of radiation sources are: thickness and density measuring devices for industries producing sheet materials such as steel, aluminum, cooper, brass, plastics, paper, film, and tape; radiography, to inspect the internal structure of metal castings, bearings, welds, and the like; medical uses, such as in x-ray machines and radium, cobalt and radioiodine treatments; pasteurization and sterilization of foods and drugs; static electricity eliminators; oil exploration techniques; agricultural uses, such as beneficial radiation-induced mutations in plants and animals, and sterilization of crop-destroying insects.[6]

Moreover, there are the uses of radioisotopes as research and tracing tools, so numerous and varied as to defy enumeration.[7]

It is apparent that an entire industrial and commercial field is opening up for the manfacturer and supplier of equipment and component parts. Packaging and transporting radioactive materials will undoubtedly be a major specialty, among others. The storage, transportation, and disposal of radioactive waste materials has already raised numerous problems, and as the atomic energy program increases its tempo this will become a very active field.

Although not necessarily directly related to the atomic energy program, another highly significant factor must be discussed. Because of the potentially insidious radiation hazards accompanying the use of atomic energy, every conceivable activity of human life will be affected thereby. All persons, whether they like it or not, will be inextricably related to atomic energy technology and may be unwilling recipients of radiation injuries. This being a reality, the lawyer must be aware of the fact that a whole new area of personal injuries and property damage is opening up and that he will have a major role in advising clients of the various theories of liability involved.[8] It is thus worth speculating whether conventional legal rules of civil liability will be retained and applied, or whether a substantial expansion and revision of these rules will be required by the turn of events.

A review of the articles written on the subject of atomic energy and the law reveals that many questions are posed and few answers provided.[9] This is only to be expected, of course, in an area which is so new and which has such a minute body of case law. However, lawyers writing in this field generally contend that the theory of strict liability, or absolute liability without fault, for engaging in an ultrahazardous activity will probably be advocated by many claimants. This theory would appear to be particularly appropriate in the case of a nuclear catastrophe arising from a reactor incident.[10]

Likewise, there is agreement that an action for private nuisance against a reactor owner might be proper in a case where the situs of a reactor in a neighborhood might diminish real estate values or where there might be a degree of incidental radioactive

[5]Id. at 41; see also pp. 41-54.
[6]Id. at 54-63.
[7]Id. at 63-69.

[8]See Green, A Broad New Field; Atomic Energy and The Practicing Lawyer, 43 A.B.A.J. 689 (1957).
[9]It would seem that the major problems arise in such categories as workmen's compensation, conflict of law, venue, burden of proof and proximate causation; statutes of limitations, and complexity of subject matter. Id. at 69-74. See also Mitchell, Atomic Energy: An Opportunity for the Bar, 44 A.B.A.J. 827 (1958); and Report of the Special Committee on Atomic Energy Law of the A.B.A. for the Annual Meeting, Philadelphia, Aug. 21-26, 1955. However, these problems lie outside of the scope of this paper.
[10]Report of the Special Committee on Atomic Energy Law of the ABA, for the Annual Meeting, Philadelphia, Pa., Aug. 21-26, 1955; Becker and Huard, Tort Liability and the Atomic Energy Industry, 44 Geo. L.J. 58 (1955); see also Stason, Legal Problems of Liability and Financial Protection Connected with Radiation Injuries (Paper prepared for A.B.A. Annual Meeting, Los Angeles, Aug. 21-26, 1958), wherein Dean Stason cites Section 5(3) of the United Kingdom Atomic Energy Authority Act which creates absolute liability without fault, and notes the general tendency in both Code and Common Law countries to gravitate toward absolute liability.

leakage from the plant affecting nearby persons and property.[11]

The negligence theory, of course, will continue to be applicable, particularly with the expanding use of the doctrine of res ipsa loquitur. Probably the theory of negligence *per se* will be of increasing importance because of the detailed statutes and regulations on all governmental levels governing atomic energy activities.[12]

At this point, and to proceed directly to the theme at hand, it is noted that commentators on the subject of atomic energy and the law generally do not examine or even mention another possible source of liability: liability for breach of implied warranty.[13] It will be the purpose of this paper to explore the applicability of implied warranty doctrines to atomic energy activities and to inquire whether we might expect any major revisions or extensions of those doctrines.[14]

The implied warranty theory is a particularly interesting concept to discuss in connection with the atomic revolution because an historical analysis of the theory indicates that it was basically a child of the English Industrial Revolution.[15] The major motivating force behind implied warranty development in the 19th Century was the need to raise the standard of performance of the manufacturer and seller in the *laissez-faire* market place. It was a reaction to the harsh results of *caveat emptor* and represented an entirely new development in the law, with a birth date of about 1815.

A body of implied warranty law grew culminating in the English Sale of Goods Act of 1893.[16] This was the direct model for our Uniform Sales Act, now in effect in some 35 American jurisdictions.[17] For the purposes of this paper it will be considered that the Uniform Sales Act provides the basis for the doctrine of implied warranties in the United States.[18] The implied warranty sections of the act provide that "there is no implied warranty as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose; and (2) where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."[18a]

A study of the Uniform Sales Act and the pertinent case law reveals the following essential elements of an implied warranty cause of action:

1. There must be a sale of goods;[19]

2. There must be a contractual relationship between the buyer and the seller; only a buyer may sue his seller;[20]

3. The goods sold must not be reason-

[11] In addition to references cited in notes (8) and (10), *supra*, see Freedman, Nuisance, Ultrahazardous Activities, and the Atomic Reactor, 30 Temp. L.Q. 77 (1957).

[12] See references cited in notes (8), (10), and (11), *supra*.

[13] However, see Becker and Huard, Tort Liability and the Atomic Energy Industry, 44 Geo. L.J. 58 (1958), and Green, A Broad New Field: Atomic Energy and the Practicing Lawyer, 43 A.B.A.J. 689 (1958).

[14] There is still another type of liability related to implied warranty liability, namely where there is reliance by the plaintiff upon an express representation in the form of publicly-circulated advertisements or sales literature. See authorities cited in *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 296, 286 P. 2d 1041 (1954). It is often said that privity of contract between plaintiff and defendant is not necessary in this type of case, but upon examination these cases really fall into the category of tort (misrepresentation) actions rather than contractual (implied warranty) actions. A purchaser of a General Dynamics Corp. "Triga" atomic reactor, for example, which is advertised as being "inherently safe", might well be able to rely upon this misrepresentation theory if he were precluded by lack of privity from proceeding on an implied warranty theory.

[15] See generally, Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931); Llewellyn, On Warranty of Quality and Society, 36 Colum. L. Rev. 699 (1936), and 37 Colum. L. Rev. 341 (1937).

[16] Chapter 71 of 56 and 57 Victoria, Feb. 20, 1894.

[17] See 1 Uniform Laws Annotated and note 1 thereunder; and see Table III, Uniform Laws Annotated, 1957 Cumulative Pocket Part.

[18] The new Uniform Commercial Code, which represents a "complete revision and modernization of the Uniform Sales Act", is now in force in Massachusetts, Pennsylvania and Kentucky. It makes no drastic changes in the implied warranty sections of the Sales Act. The non-Sales Act states are essentially the agricultural, non-industrial states, but generally they utilize an implied warranty theory drawn from the English Common Law which is generally similar to the Uniform Sales Act.

[18a] Uniform Sales Act, §15 (1) and (2).

[19] *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E. 2d 792 (1954).

[20] *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P. 2d 1041 (1954).

ably fit for purpose nor merchantable if the cause of action is to succeed;[21]

4. There must be damage proximately caused by the breach.

There are certain defenses to the implied warranty action which could be important in the atomic energy field:

1. The Uniform Sales Act, Section 15 (4), provides that in the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose. This simply means that where the buyer gets the distinct thing selected by him, the exact article for which he bargains, it cannot be inferred that he relied upon the skill or judgment of the seller, and hence no implied warranty of fitness for purposes arises.[22] However, the implied warranty of merchantable quality would not be barred.

2. The Uniform Sales Act, Section 15-(6), provides that an express warranty or condition does not negative a warranty or condition implied under this Act unless inconsistent therewith. Thus, for example, where the seller expressly warrants to provide "No. 2 grade white corn," which by definition is unfit for human consumption, the "No. 2 grade" designation in the contract constitutes an express warranty inconsistent with any implied warranty that the corn was fit for consumption.[23]

3. Another defense which could possibly be available to a seller in an implied warranty action is that relating to the buyer's unusual susceptibility to ingredients in the product. This defense seems to be based upon a foreseeability concept; that it would be unreasonable to hold the manufacturer or seller to an implied warranty running to those few persons whom it could not be foreseen would be harmed. Thus, where an injured plaintiff is not one of a previously ascertainable or foreseeable "susceptible" group, it is clear that the manufacturer has no duty to warn and that no warranty as to this person will be implied.[24]

With the foregoing summary in mind, let us construct several hypothetical atomic energy situations wherein implied warranty concepts might be applied, modified or extended:

A. A sale of a nuclear reactor by a manufacturer such as General Electric Company to a utility company such as Pacific Gas and Electric Company.

Upon installation of the reactor, numerous things could possibly happen to cause personal injury or property damage. For example, the reactor could explode, it could leak radiation, or it could simply fail to run, or run inefficiently. In any of these occurrences, it would seem that the purchaser, Pacific Gas & Electric Company, would probably have a good cause of action for breach of either of the implied warranties, assuming that the damage was caused by a defect in the reactor and not by the negligence of a third party. Further, it would seem that there is nothing so mysterious about atomic energy which would make this sale any different from the sale of any other type of equipment or machinery.

Although the utility company would have its implied warranty action against the manufacturer, would an injured employee of the utility company be able to sue the manufacturer on an implied warranty theory? Under conventional case law, the answer is negative because there was no sale to or contractual relationship with the injured employee.[25] Further, there would seem to be no compelling reason to water down warranty principles to permit recovery in such a situation, especially when the injured party has available several alternative tort theories.

As for the person not in the employ of the utility company, such as someone in the neighborhood of the reactor plant who is injured, clearly there would be no implied warranty cause of action, for there was no sale of goods or contractual relationship.

[21]The difference between the two implied warranties is important but not mysterious. If a buyer simply requested goods (i.e., a hat) for general purposes, the seller's implied warranty which would arise, if any, would be that the hat was reasonably merchantable, or fit for general wear. If a buyer requested specific goods (i.e., a rugged, waterproof hat for duck hunting), and if the buyer relied on the seller's skill and judgment to select the appropriate goods, the seller's implied warranty, if any, would be that the hat was reasonably fit for duck hunting purposes.

[22]Annot, 59 A.L.R. 1180 (1929); 1 Williston, Sales, §236 (rev. ed. 1948), and cases cited therein.

[23]*El Zarape Tortilla Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 203 P. 2d 13 (1949); 1 Williston, Sales §239 (a) (rev. ed.) (1948).

[24]*Merrill v. Beaute Vues Corp.*, 235 P. 2d 893 (10 Cir., 1956), and cases cited therein; Annot., 26 A.L.R. 2d 963 (1952).

[25]But see *DiVello v. Gardner Mach. Co.*, 102 N.E. 2d 289 (Ohio C.P. 1951).

B. Sale of a small nuclear electric power device for the conversion of radioactive fuel into electricity.

On January 16, 1959, the Atomic Energy Commission announced that just such a device, utilizing radioactive polonium 210 for its energy, had been developed.[26] Although presently valuable in connection with space missiles systems, this five-pound device is said to have vast potential for peaceful applications, particularly in air and sea navigation aids and communications lines. Shortly after the news release, one nuclear scientist claimed that the tiny generator contained a quantity of polonium which, if released in Washington, D.C., would make that city uninhabitable for years because of the radiation hazard.[27] The Atomic Energy Commission promptly reassured the public that the device was contained in a triple jacket which assured "complete safety."[28]

This is but one example of the practical uses of radioactive isotopes which will surround us in our daily lives. And, as in the case of the sale of a large reactor, the seller of the small radioisotope packet impliedly warrants to the purchaser that it is reasonably fit for a certain specified purpose or for the general purposes for which it was sold. Again, assuming the necessary contractual relationship between buyer and seller, an implied warranty action will lie.

C. Sale of a radioisotope to a hospital, doctor, or research institution for medical purposes.

In this situation, any number of incidents could occur, as in industrial uses, resulting from, for example, the improper packaging or shielding of the isotope, or conceivably the isotope might be of the wrong variety, being too potent for its stated purpose, or perhaps even impotent.

As in the case of other sales, the vendee could bring an implied warranty action against the vender, but could a patient rely upon any implied warranty and sue a doctor or hospital for radiation damage caused by a course of medical treatment? Although there exists the necessary contractual relationship between doctor and patient, was there a sale of goods? The general answer, of course, is "no" under the present decisions of the courts.[29] At most, there might have been an incidental sale of drugs or bandages, but the major purchase was of medical services, including professional skill and judgment. Under the present status of the law, a patient would not be entitled to assert any implied warranty. In view of the probable denial of recovery to the patient on a warranty theory, is it reasonable to expect an extension or change in the law as we know it today? Probably all that can be said at the present time is that there appears to be no real need for giving the injured patient another cause of action when there already exists the well developed negligence theory; also there might be liability without fault for engaging in an ultra-hazardous activity.

D. Sale of radiation-contaminated foodstuffs for human consumption.

The final hypothetical situation which will be mentioned is the one which is believed to present the most serious implied warranty problems, both from the point of view of the orderly development of the law and also from the point of view of balancing the interests of private enterprise and the individual consumer. It is in this situation that contentions for widespread extensions of the implied warranty theory could be made. Noteworthy is the fact that in this area of foodstuffs conventional implied warranty theories are undergoing a great amount of judicial re-examination on the non-atomic level.[30]

One need not be an alarmist or have an exaggerated imagination to underscore and emphasize the possibility of the radiation-contaminated foodstuff. For example, suppose a school of fish in radioactive waters is caught by the fishing fleet, returned to port, sold to a processor, canned, and distributed to food markets throughout a wide area. Eventually, it finds its way to the dinner tables of restaurants and homes. The radioactivity, in this hypothetical case having a very long life span, remains with the fish throughout the entire process and finally comes to rest in the bones of the ultimate consumer.

[26]U. S. Atomic Energy Commission News Release, Washington, D. C., Jan. 16, 1959.

[27]Dr. Ralph E. Lapp, letter to Editor of Washington Post and Times Herald, reported in San Francisco Chronicle, Jan. 21, 1959, p. 1.

[28]Ibid.

[29]See *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E. 2d 792 (1954); *Gile v. Kennewick Public Hospital Dist.*, 48 Wash. 2d 774, 296 P. 2d 662 (1956); *Merck & Co. v. Kidd*, 242 F. 2d 592 (6 Cir., 1956), cert. denied 78 S. Ct. 15.

[30]See Dickerson, Products Liability and the Food Consumer (1951).

Or consider the problems which might arise if crops were exposed to radioactive fall-out, or if livestock were so exposed as actually did happen in Utah when sheep on a ranch were injured following fall-out from nuclear experiments.[31]

More appropriately, let us take as our key example an incident which really did occur: The Windscale Atomic Reactor accident in a dairy farm region in Cumberland, England, in October, 1957.[32] Evidenly the uranium rods in the atomic reactor in Windscale had become overheated and a surge of radioactive dust escaped from the 500 foot high chimneys. Several days later tests of milk samples showed that the raioiodine content was six times the permissible level. The dairy cows, of course, had ingested the dangerous radioiodine and it came to rest in the cow's milk in greater concentration than anywhere else in the cow's body.

Accordingly, the United Kingdom Atomic Energy Authority placed a milk ban upon some 1000 dairy farms in the area, and it became necessary out of an abundance of caution for the Authority to destroy approximately 670,000 gallons of milk, the value of which approximated some $150,000.[33] As if this were not enough of an economic burden upon the small dairy farmers in the area, the Windscale incident raised other similar problems. The radioactive surge from the reactor settled upon the soil, the waters, the crops and the livestock in the vicinity. Fortunately, the AEA reassured the English people that the only real hazard was in milk consumption, for the reason that infants and children who are the prime consumers of milk were more likely to be adversely affected than adults—the ratio of the youngsters' fluid intake to their body weight being so much greater. Although the AEA announced there was some likelihood that the animals in the neighborhood might have the thyroid gland affected by the radioactive dust, the public was told that the consumption of grain and vegetables, and cattle, sheep or pigs slaughtered during that crucial time would be safe and edible. Fortunately this contamination was discovered and apparently no one was physically harmed thereby. But this incident serves to highlight the terrible consequences which could occur if meats, vegetables, grain, and dairy products ever reached the market place with a radioactive content, without anyone knowing of its dangerous propensities.[34]

It is the foregoing type of situation which probably will provide the most fruitful field for employment of implied warranty theories by claimant's attorneys. In many casess the actual source or cause of the contamination will be difficult or impossible to prove, unknown, or outside of the jurisdiction.[35]

Of course, if one does not know the source of the contamination, or if the source is outside of the jurisdiction, it will be practically impossible to proceed on any theory of strict liability, negligence, or negligence per se. Therefore it would appear that a cause of action for breach of implied warranty would be quite important to the injured consumer or a middleman in the chain of sale and resale. Surely the injured party could ascertain who was the food processor who put the foodstuffs into final form for sale to the public. And, of course, the consumer knows from whom he directly purchased the foodstuffs. Since implied warranty is not usually dependent upon any lack of due care, it probably would make little difference in the ordinary case whether the food processor or retail seller had actual knowledge of the defect or not.

The main hurdle would be the requirement of contractual relationship in a suit against a remote food processor. There would be no such problem in the case of a suit against the retailer. With respect to the remote food processor there is at the present time in many states of the United States a so-called "foodstuffs" exception to the requirement of contractual relationship, and it is possible that there is a trend

[31] *Bulloch v. United States,* 133 F. Supp. 885 (D. Utah, 1955).

[32] See the lengthy study given this incident by Muldoon in his series of articles entitled "Alice in Nuclear Energy Land", 42 Mass. L.Q., No. 4, p. 9 (1957) and 43 Mass. L. Q., No. 1, p. 38 and No. 2, p. 55 (1958).

[33] See Radioactive Hazards, 12 Industrial Law Review 174 (1958).

[34] One need hardly emphasize that radioactivity cannot be seen, tasted, heard or smelled.

[35] Radioactivity does not respect state or national boundaries. If radioactive fall-out from one country's atomic weapons testing should cause injuries in another country, there is no legal remedy presently available to the injured party.

developing in this direction.[36]

It is often stated that the implied warranty, as an instrument of consumer protection, should be imposed upon the one who is in the best position to take corrective action to remedy potential defects.[37] Thus it could be argued that the party having the best opportunity to detect radioactivity will be the food processor. Reasonably simple tests should be available for this detection process. Moreover, the test would be made on quantities of foodstuffs at a central point, and thus might offer more protection to the public than if each unit of food were required to be tested separately by a small retailer. On the other hand, there is the countervailing argument that the detection tests should be made at a time and place as close as possible to the ultimate consumer in order to detect any possible radiation intervening between the food processor and the final sale.

In conclusion, it is felt that, with respect to theories of liability as such, traditional legal concepts will be practical and adequate in providing a framework for legal action in the atomic energy environment.[38] It is believed the theory of breach of implied warranty will become increasingly important. This doctrine, usually not being dependent upon any lack of due care on the part of defendants, may be considered peculiarly convenient and appropriate. It follows, then, that every business organization and individual in the chain of sale and resale of goods must give consideration to the hazard of potential liability under implied warranty concepts.

Lawyers, lawmakers and judges should be alert to guard against hasty or ill-advised extension or expansion of this doctrine, particulary for considerations of convenience or expediency in a novel and developing field.

[36]See note (30), *supra*. Also see Oct. 1955 Insurance Counsel Journal, Vol. 22, p. 431.

See cases cited in Wilson, Products Liability, Part I, 43 Calif. L. Rev. 614, 643-44 (1955).

[37]See, for example, Mr. Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P. 2d 436 (1944): "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Id. at 642.

[38]Becker and Huard, note (10), *supra*, state with perhaps an overabundance of confidence: "The advent of the Atomic Age will scarcely cause a ripple on the even surface of the principles of tort liability. Lawyers can rely with confidence on all the familiar doctrines and precepts. These will remain unchanged." However, it should be noted that principles of tort liability and particularly warranty liability do not present an "even surface" but are in a state of dynamic change in their present non-atomic environment. Moreover, it is reasonable to expect that new and difficult problems will arise in such matters as statutes of limitation, jurisdiction, conflict of laws, and evidentiary proof, and that traditional rules will not be entirely satisfactory to deal with all these problems.

Cooperation Clauses in Automobile Liability Policies

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The Problem

THE DISAPPEARANCE of an insured defendant, or his failure to attend the trial of a suit for damages filed against him, would seem to be a matter of grave concern even to the case hardened veterans among defense counsel who are selected by insurance companies because they are supposed to be able to cope with such problems.

The standard automobile liability insurance policy is apt to contain a condition precedent to liability couched in the following language:

> "The Assured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits, and the Company shall reimburse the Assured for any reasonable expense, other than loss of earnings, incurred at the Company's request."

A Case History

Assume that your assured has disappeared from his home and family while an action for personal injuries was pending against him and, despite heroic efforts on your part, he cannot be located. After several adjournments, on the day set for trial you are granted one last adjournment and, from your assured's friends, who are the plaintiff and plaintiff's attorney, you receive addresses which enable you to locate your assured in another state. You thereupon contact an attorney in the other state, who hands your assured, well in advance of trial, a letter from you, receipt of which he acknowledges in writing, in which you advise him that his presence at the trial is absolutely essential to the defense of his law suit; that the policy obligates him to attend the trial and give assistance to the attorneys hired by the company to protect his interests; and that upon his failing to cooperate by attending the trial, the attorneys will withdraw from the case and he personally will be responsible for any damages awarded the plaintiff. Also assume this letter was read and explained to your assured, and a tender in cash was made, adequate to cover his expenses in attending the trial.

The day before the trial you again contact him, and he decides he is judgment proof, a friend of plaintiff's lawyer, and for personal reasons will not attend the trial. Later you find that he was not ill the day of the trial, and spent the day working at his regular job. You also learn that, after suit was filed on this claim, your assured was brought by the plaintiff to his lawyer's office, where he signed a statement admitting he did'nt know what side of the road he was on when the headon collision of his truck and plaintiff's car occured.

Although the court previously has informed you he will not grant any further adjournments, you request one, saying you can't try the case without your client because he and the plaintiff are the only eye witnesses, and rain washed out any physical evidence as to where this headon collision between the parties' automobiles occured. When the court denies your motion, you withdraw from the case, the jury is dismissed, and plaintiff's lawyer, unhampered by any inhibitions, secures a judgment by default in an amount your investigation indicates is four times the value of his claim. A writ of garnishment thereupon issues, directed to your insurance company, and you find yourself confronted with a hearing on the statutory issue.

Your proofs show all these facts and that you are weak on liability, but the assured was in the same room with plaintiff at the hospital for six days, and has told you plaintiff confessed the doctors couldn't find anything wrong with him. Also, the plaintiff has quite a criminal

record, and the assured has none. You insist, when plaintiff produces your assured at the garnishment hearing (having brought him from another state), that you have a right to a trial by jury of the issues of liability and damages in the prinicpal case, and you should not be required to try the prinicpal action without some assurance from the assured that he will attend the trial. The assured sits there and will not give that assurance. The trial judge then remarks that you are groping at straws, afraid to try the prinicpal action, and enters judgment against the company, despite your plea that you want the assured beside you, available for rebuttal, when you try this case before a jury, and you need him in connection with your preparation and the trial on the question of the extent of plaintiff's injuries, a deposition not being sufficient.

The Court's Opinion

On these facts, the Supreme Court of Michigan, speaking through a new member, Justice John D. Voelker, sustained the judgment, saying:

> "On the main issue, whatever the law may be elsewhere, in Michigan we seem committed to the rule that in order for an insurance company to successfully claim non-cooperation of its assured as a defense in these situations it not only has the burden of showing such lack of cooperation but also that it was prejudicial."
>
> "The Michigan rule is simply that where an insurer pleads noncooperation prejudice will not be presumed from a mere showing of noncooperation, but the insurer must also introduce proofs tending to show actual prejudice, and further—and this is the nub of this case —that where the evidence on this score is conflicting, this Court will not disturb the finding of the trier of the facts if it is supported by competent evidence."
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> "Any other rule might tempt some insurance companies (present company, of course, excepted) to be less concerned with defending or settling their claims than with subtly encouraging certain of their less desirable risks to 'get lost' and stay lost while at the same time building a plausible if perfunctory record for an ultimate claim of noncooperation."
>
> "In the miraculous and possibly embarrassing event that at the last minute the lost should become found, still other companies (present company still excepted) might likewise be tempted to visit them with investigators or pelt them with elaborate legalistic communications filled with peremptory demands and dire forebodings more shrewdly calculated to drive or freeze their man into a state of noncooperation than to produce him in court."[1]

The court rejected the comment in 8 Appleman, Insurance Law and Practice, Section 4773, that the need show the verdict was the result of lack of cooperation places an "insurmountable burden" upon the insurer. Appleman urges that, upon breach of the cooperation clause, prejudice should be presumed, as had been held in California and other states.

The Willie Cheatum Philosophy

The opinion in the Michigan case, *Allen V. Cheatum,* is remarkable in several respects. First, a trial judge normally is manifestly unwilling to go into the merits of the main case in a garnishment proceeding. A prima facie showing of prejudice should be sufficient under the circumstances. It has been held prejudicial error for a trial judge to permit a plaintiff, in the garnishment proceeding, to try the damage suit against the assured on plaintiff's theory that the assured's lack of cooperation was immaterial.[2] Second, no mention is made in the opinion about prejudice in connection with the issue of damages, though the company's attorneys pressed that issue. Third, no mention is made in the opinion regarding the company's right to a trial by jury of the issues of liability and damages, though that point also was extensively briefed and argued.

About ten years ago, Justice John R. Dethmers, of the same court, met the argument that no prejudice had been shown under a cooperation clause by quoting from a New Hampshire case the following:

> "Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if

[1] *Allen v. Cheatum,* 351 Mich. 582, 88 N.W. 2d 306.

[2] *Royal Ind. Co. v. Rexford* (5 Cir., Fla.), 197 F. 2d 83.

not hopelessly, prejudiced by his absence from the trial. Such absence, if not adequately explained, is a circumstance, 'chiefly persuasive as distinguished from probative in its effect' (Login v. Waisman, 82 NH 500, 502, 136 Atl. 134, 136), which normally affects the decision of the jury upon all questions submitted to them. Even if the liability of a defendant were admitted or conclusively established, it cannot be doubted that the mental attitude of the jury in assessing damages would be influenced by his unexplained absence from the courtroom. Due regard for the current demand for realism in the administration of the law does not permit the adoption of the defendants' argument that the plaintiff was not prejudiced by Keliher's absence from the trial of the case against him.

"The theoretical answer to the defendants' argument, which is equally complete, was well stated by Cardozo, J. in Coleman vs. New Amsterdam Casualty Co., 247 NY 271, 160 NE 367, 369, 72 ALR 1443, as follows:

" 'The argument misconceives the effect of a refusal. Cooperation with the the insurer is one of the conditions of the policy. When the condition is broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent." "

A leading case in this field is *Shalita v. American Motorists Ins. Co. (N.Y.)*, containing the following comment:

> "The insured's absence, even though the testimony * * * might be adverse, is a serious handicap in settlement of a claim or upon a trial for the determination of damages * * *. Nor as a matter of contract may we measure the extent or quality of what is obviously more than a trivial breach of the terms of the agreement."[4]

In *Indemnity Ins. Co. Of N. Am. v. Smith (Md.)*, it is said:

> "The failure of the insured to comply with this condition precludes recovery by the person injured from the insurer, even though cooperation might not have defeated the plaintiff's claim for damages. It is plain that a condition in a liability insurance policy requiring cooperation of the insured in the defense of any action brought against him by a person injured is of the utmost practical importance, for without the aid of the insured in the preparation of the case and his presence at the trial, the insurer is handicapped, even to the point that defense of the case is impossible."[5]

In *Cameron v. Berger (Pa.)* it was held that even though the insured's liability was clear, the insurer was prejudiced by her failure to contest the important issue of the amount of damages to be awarded.[6]

The Right to Trial By Jury

The Willie Cheatum opinion ignores the claim of right to a jury trial—a right increasingly being exercised by defense counsel who fear the efforts of some so-called liberals on the bench to redistribute the wealth. Conceded that insurance contracts may and should be strictly construed against those who issue them without consultation with the insured, must this strict rule of construction be so applied that insurance companies cannot have their day in court, before a jury? The court may ignore realism and say, "You must defend, with or without the help of the principal defendant." Should it go further, liability being clear, and deny the right to trial by jury on the issue of damages? If so, it seems to the writer that the maxim, "All men are equal before the law," is not being applied with any regard for the general public, which supplies the insurance premiums paid out to satisfy these judgments, and is the real party in interest in these cases. Such partinsanship is more properly exhibited in the legislature than in the judiciary, and preferably should be limited to the privacy of one's office or home.

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[3] *Kennedy v. Dashner*, 319 Mich. 491, at 499, 30 N.W. 2d 46; *Glens Falls Ind. Co. v. Keliher*, 88 N.H. 253, 187 Atl. 473.

[4] *Shalita v. Am. Motorists Ins. Co.*, 266 App. Div. 131, 41 N.Y.S. 2d 507.

[5] *Ind. Ins. Co. of N. Am. v. Smith*, 197 Md. 160, 78 A. 2d 461.

[6] *Cameron v. Berger*, 336 Pa. 229, 7 A. 2d 293.

General Factors

It is the general rule that lack of cooperation by an insured in failing to attend a trial must be actual, substantial, or material, to void the policy.[7]

It also is true, by the great weight of authority, that the injured plaintiff stands in the shoes of the assured, and has no greater rights under the policy than has the assured. In other words, plaintiff's right to recover against the garnishee generally is dependent upon the right of the principal defendant so to recover.[8]

The courts which have denied a defense under a cooperation clause usually have done so for one or more of the following reasons:

1. No request made to assured to appear, or request came too late.
2. Excusable or justifiable absence from trial.
3. Expense money not tendered.
4. Witness not a party litigant.
5. Defendant not a participant in transaction.
6. Testimony merely cumulative.
7. Testimony could have been taken by deposition.
8. Policy did not expressly require attendance at trial.
9. Collusion between insurer and insured.
10. Waiver by proceeeding with defense.

The right of the company to defend, in the absence of the assured, under a reservation of rights, without waiving its policy defense, has been recognized by many courts.[9] In all except the clearest of situations, proceeding with the defense under a reservation of rights would appear to be the safest course to follow.

Conclusion

It is suggested that many of such appellate court decisions adverse to insurance companies originate in a "soak the rich, help the poor" philosophy, or result from a lack of experience by some justices in trial work. We need a greater recognition that it is the general public which pays these judgments via insurance premiums. We also need a better understanding by the bench of the vagaries of human nature as exhibited by jurys.

[7]6 NCCA (N.S.) 166; 15 NCCA (N.S.) 284; 72 A.L.R. 1446 (ann); 60 A.L.R. 2d 1146 (ann).

[8]29 Am. Jur. Ins. Sec. 1090; *Brogdon v. Auto Ins. Co.*, 290 Mich. 130, 287 N.W. 406.

[9]60 A.L.R. 2d 1157.

The Investigator and Wiretapping

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THE LAW OF ANY insurance case is worth no more than the facts upon which it is based. The insurance lawyer and the insurance investigator are constantly assembling facts. Recent developments in electronics, wire recorders, secret microphones and other electronic "ears" have made it possible to eavesdrop and wiretap to secure evidence. The legality of these methods of assembling evidence will be of interest both to insurance lawyers and to insurance investigators. Is such evidence admissible for or against an insurance company in the trial of a law suit? Let us review the present state of the law, then, on wiretapping and eavesdropping as it may affect all of us today.

I. Present Status of Federal and State Law Relating to Wiretapping and Eavesdropping.

a. Federal situation today

Eavesdropping is not new to the law. Blackstone tells that it was a crime at common law.[1] The first important United States Supreme Court decision on wiretapping came in the *Olmstead* case in 1928. The court in a 5-4 decision ruled that evidence obtained by wiretapping did not violate the Fourth or Fifth Amendments because it was not the result of an illegal search or seizure.[2] It was in his dissent in this case that Mr. Justice Holmes first used the now hackneyed phrase that wiretapping is "dirty business."

Congress stepped into the picture in 1934 and enacted what is now Section 605 of the Federal Communications Act.[3]

The crucial sentence in that statute for our purposes is this one:

> " . . . *no person not being authorized by the sender* shall *intercept* any communication *and divulge* or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication *to any person;* . . ." (italic supplied)

Supreme Court decision since 1934 have held that wiretapped evidence secured in violation of Section 605 is not admissible in federal courts because illegally obtained.[4] In the *Weiss* case in 1939 the court held that Section 605 applied to intrastate telephone communications as well as interstate conversations.[5] However, in *Schwartz v. Texas*[6] the court ruled that Section 605 was not intended to impose a rule of evidence on state courts and that that section did not render inadmissible in a *state* criminal trial wiretap evidence secured by violation of the federal statute. The sum of the federal law then is this:

1. Section 605 of the Federal Communication Act prohibits any person's violating the integrity of telephonic communication and contains an express, absolute prohibition against the divulgence of wiretapping.[7]

2. Evidence obtained by wiretapping by either state or federal agents is inadmissible in federal courts because obtained illegally in violation of Section 605 of the Federal Communications Act.[8]

3. Evidence obtained by wiretapping which violates Section 605 may nevertheless be received in evidence in *state* courts where permitted by state law.[9]

In 1939 the Supreme Court in the *Nardone* case barred in the federal courts evidence obtained as a result of wiretaps in violation of Section 605. Then the Department of Justice advised FBI Director Hoover that the court decision would not

[1] Black. Comm. Bk. IV, Chap. 13, §168.
[2] *Olmstead v. United States*, 277 U. S. 438 (1928).
[3] 47 U.S.C.A. §605.
[4] *Nardone v. United States*, 302 U. S. 379 (1937); *Nardone v. United States*, 308 U. S. 338 (1939) (second case); *Weiss v. United States*, 308 U. S. 321 (1939); *Goldstein v. United States*, 316 U. S. 114 (1942); *Goldman v. United States*, 316 U. S. 129 (1942); *Benanti v. United States*, 355 U. S. 96, 2 L. Ed. 2d 126 (1957).
[5] *Weiss v. United States*, 308 U. S. 321 (1939).
[6] 344 U. S. 199 (1952).
[7] *Benanti v. U. S.* 355 U. S. 96, 2 L. Ed. 2d 126, 130-31 (1957).
[8] *Benanti, supra.*
[9] *Schwartz v. Texas*, 344 U. S. 199, 97 L. Ed. 231 (1952). *Cf. People v. Cahan*, (Calif.), 282 P. 2d 905 (1955).

affect the FBI practices because the illegality of a wiretap under the act was in the *divulging* of the information and not in the *interception*. At Mr. Hoover's insistence, however, the authorization for wiretaps was placed in the hands of the Attorney General in 1940. Don Whitehead's book, *The FBI Story*, tells us that:

> "President Roosevelt and succeeding administrations all gave their approval to the FBI's wiretapping. Beginning in 1933 eight successive Attorneys General, three of whom went to the Supreme Court, ruled that the FBI was on sound legal grounds when making taps."[10]

After a complaint in the 1939 election campaign in Rhode Island, the FBI turned up evidence of wiretapping. There followed a Senate investigation in which the Attorney General, Robert Jackson, came to the FBI's defense. He said:

> "In a limited class of cases, such as kidnapping, extortion, and racketeering, . . . it is the opinion of the present Attorney General . . . that wiretapping should be authorized under some appropriate safeguard."[11]

Jackson, however, then announced that upon J. Edgar Hoover's recommendation, he was ordering wiretapping discontinued by the FBI. President Roosevelt had other ideas. The President ordered the FBI to resume wiretaps in cases approved by the Attorney General. [12]

The Federal Communications Commission has taken the stand that wiretapping even in the name of national security is illegal.[13] This interpretation of the law is not shared by the Department of Justice which has held that authorized wiretaps are entirely legal as long as the information obtained is not divulged to "unauthorized persons."[14] The Department of Justice's view has been approved by such recent Attorneys General as Murphy, Jackson, Biddle, Clark, McGrath, McGrannery. *The FBI Story* states that: "These rulings on wiretapping have all been concurred in by former Attorney General Herbert Brownell, Jr."[15]

[10]Whitehead, The FBI Story, p. 155.
[11]*Id.*, p. 179.
[12]*Ibid.*
[13]*Id.*, p. 187.
[14]*Id.*, pp. 187 and 342.
[15]*Id.* pp. 187 and 343.

The federal statute itself has been construed by the Department of Justice and various Attorneys General in a way that you and I would conclude was mere rationalizing. For example, "any person" has been interpreted by the Justice Department *not* to prohibit divulging wiretapped evidence to one's superior in the Department of Justice.[16] Of course, that is *not* the way the Chief Justice of the United States interpreted the same statute in the *Benanti* case.[17]

The 1957 legislature in New York State, under the intelligent leadership of the Savarese Committee, passed three statutes which were signed by Governor Harriman and became effective law July 1, 1957.

The first amendment created a new article, Article 73 of the Penal Law. New Section 738 of the Penal Law defines eavesdropping.

The definition states in part that "A person:

1. Not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears, or records a telephone or telegraph communication, . . .; or
2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, . . .; or
3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury, . . .

is guilty of eavesdropping." The crime is made a felony (Section 740) punishable by two years in prison. "Person" by definition includes the subscriber to the telephone, but excludes any law enforcement officer who is acting lawfully and in his official capacity in detecting crime.

The second important 1957 amendment was to the Code of Criminal Procedure, Section 813-a. The 1957 amendment required the court to satisfy himself of the existence of reasonable grounds for granting an order to permit wiretapping, and reduces from six months to two months the effective period of such judicial orders. The 1958 amendments to the Penal Law (Article 73) and the Code of Criminal Procedure (Sections 813-a and 813-b) brought eavesdropping by microphone or "bug-

[16]*Id.*, pp. 187 and 343.
[17]*Benanti v. U. S.*, 355 U. S. 96, 2 L. ed. 2d 126, 130 (1957).

ging" under these same sections of the statute, with a 24-hour hot-pursuit exemption recommended by the New York State Bar Association's Civil Rights Committee. The law was also amended to provide that law officers must get a court order in order to eavesdrop by microphone and that, if they fail to do so, they become liable to a penalty of two years' imprisonment.[18]

A third important amendment adopted in 1957 relates to the admissibility of wiretapped and eavesdropped evidence. Section 345-a of the Civil Practice Act now provides that evidence obtained by any act of eavesdropping in violation of these new laws shall be *inadmissible* for any purpose in any civil action, proceeding or hearing; but will be admissible in a governmental disciplinary action. Note that this last C.P.A. amendment *does not include criminal cases.* New York still follows the rule in the criminal cases that illegally obtained evidence is admissible.[19]

The present situation under New York law today then is as follows:

1. Eavesdropping by wiretapping or by "bugging" is illegal unless
   a. You are a law officer acting under an *ex parte* court order; or
   b. You are recording your own telephone conversation or your own discussion.[20]
2. Evidence obtained by illegal eavesdropping is *inadmissible* in a civil action, proceeding or hearing, and is *admissible* in governmental disciplinary hearings, and in state criminal trials.

Two very important, recent decisions of the Supreme Court of the United States are *Benanti v. U. S.*[21] and *Rathbun v. U. S.*[22] in which the court had some pointed things to say about state laws, like New York State's, which permit authorized wiretapping.

In *Benanti* the Supreme Court said:

". . . the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a state from authorizing wiretapping in the exercise of its legitimate police functions. However, we read the Federal Communications Act, and Section 605 in particular, to the contrary."[23]

The Supreme Court therefore concluded in *Benanti* that:

"we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."[24]

New York State Supreme Court Justice Hofstadter has interpreted this language as prohibiting the issuance of any wiretapping orders at all under New York law.[25] Under the supremacy clause of the Federal Constitution there is much to be said for his viewpoint.

New York State Attorney General Lefkowitz has taken the view that until a court of competent jurisdiction declares the present New York law unconstitutional, it is the state attorney general's duty to defend it.[26]

Lawyers are therefore enmeshed today in this state in this tangled web of legal rules:

1. The U. S. Supreme Court, interpreting Section 605, has held *no person* can intercept and divulge a telephone conversation.
2. A President of the United States, and various Attorneys General, three of whom later became Supreme Court Justices, have specifically authorized the Department of Justice and the FBI to tap in cases involving national security and grave crimes like kidnapping—in direct violation of the Supreme Court's decisions as I read them.
3. Wiretapping by our own police officers is legal under New York State law if the proper procedure is followed.
4. A telephone subscriber may record his own conversations with anybody by machine, or by having his

[18]Code of Criminal Procedure, §813-a and 813-b, and Penal Law, §739.

[19]*People v. Defore*, 242 N. Y. 13, (1926); *Twining v. New Jersey*, 211 U. S. 78 (1908).

[20]Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications, Legislative Document (1957), No. 29, pp. 14-15; *Rathburn v. U.S.*, 355 U.S. 96, 2 L. Ed. 2d 134 (1957).

[21]355 U. S. 96, 2 L. Ed. 2d 126 (1957).

[22]355 U. S. 96, 2 L. Ed. 2d 134 (1957).

[23]2 L. Ed. 2d 130, 131 and 132.

[24]2 L. Ed. 2d at 133.

[25]N. Y. Times, Jan. 3, 1958, p. 1, col. 7; *Matter of Interception of Telephone Communications*, 170 N.Y.S. 2d 84, 9 Misc. 2d 121 (1958). U. S. Attorney Paul Williams is quoted by the N. Y. Times as saying that Justice Hofstadter's view is "absolutely right." N. Y. Times, Jan. 6, 1958, p. 23, col. 3.

[26]N. Y. Times, Jan. 3, 1958, p. 14, col. 6.

secretary listen in on an extension telephone both under state and federal law.[27]

We are in this dilemma because of the conflict between the obvious public interest in national security and crime detecton on the one hand, and the individual's civil right to privacy on the other hand. Let us look briefly for a moment at the crime detection picture and then at the civil liberties issue. Perhaps then we can come up with a suggested solution to this knotty set of problems.

First, then, is there justification for wiretapping in the field of crime detection?

II. The Crime Detection Problem

Among the arguments in favor of wiretapping in violation of Section 605 in the detection of crime are these:

1. That informers are no novelty in law and wiretapping is analogous to an informer.[28]
2. That there is great need for wiretapping in catching heinous criminals like kidnappers, Communists, etc., or spies in war time.[29]
3. That the police are obligated to enforce the law, and that therefore, though they may violate Section 605, there will be little abuse of wiretapping technique.[30]
4. That crime is big business today, and that modern methods of business organization and communication are used by them. This is the fight-fire-with-fire argument.[31]
5. That the wiretapping technique has yielded valuable information which could be procured in no other way.[32]

There is some merit in these arguments. Narcotics, murder, kidnapping and Communist spying are all "dirty business," too. There is no merit, however, in the position that law enforcement officers should be permitted to violate the very law which they are sworn to uphold.

In its most recent pronouncement on the subject last December in *Benanti*, the Supreme Court, after reviewing its earlier decisions, said:

> "The crux of those decisions is that the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and that evidence obtained in violation of this prohibition may not be used to secure a federal conviction . . . Section 605 contains an express, absolute prohibition against the divulgence of wiretapping."[33]

Former United States Attorney Paul Williams recently stated in commenting on *Benanti* that:

> "The effect of the recent interpretation of Section 605 is to deprive all state and federal law enforcement authorities of the right to wiretap in any case, regardless of how serious, and to deny to federal authorities, and possible state authorities as well, the right to use leads which come from any wiretapping."[34]

This legal situation really creates a dilemma for a prosecutor, who should stand before the public as the conscience of the community as well as its legal defender against the dirty business of modern crime.

The conclusion seems inescapable that most of us are in fact accepting the need for wiretapping by the police to some limited extent. The people of the state of New York have specifically approved it by their 1938 amendment to the state constitution. The present evils in the crime detection field are twofold:

1. The actual violation of the law, as interpreted by the Supreme Court, by our law enforcement officers; and
2. The callous indifference of Congress to attempts to amend Section 605 and bring it up to date.

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[27] *Rathbun v. U. S.*, 355 U. S. 96, 2 L. ed. 2d 134 (1957).

[28] The FBI Story, pp. 153-154.

[29] Silver, "The Ethics, Morals and Legality of Eavesdropping," 9 Brooklyn Barrister (No. 5, Feb. 1958), p. 153.

[30] See e.g., Edward S. Silver, District Attorney of Kings County, New York, "The Ethics, Morals and Legality of Eavesdropping," in 9 Brooklyn Barrister (No. 5, February, 1958), at pp. 153-55.

[31] Williams, "The Prosecutor and Civil Rights," 13 The Record of the Association of the Bar of the City of New York (No. 3, March, 1958), at pp. 132-33.

[32] *Id.*, p. 134.

[33] *Benanti v. U. S.*, 355 U. S. 96, 2 L. Ed. 2d 126, 130-31.

[34] Williams, "The Prosecutor and Civil Rights," 13 The Record of the Association of the Bar of the City of New York (No. 3, March, 1958) p. 135; and see N. Y. Times, Jan. 6, 1958, p. 23, col. 3.

III. The Civil Rights Issue

Here is a partial list of some of the abuses to which the public has been subjected by wiretappers and eavesdroppers:[25]

1. Republicans and Democrats and government agencies have tapped each other's wires.
2. City officials in New York City had their wires tapped several years ago.
3. Private wiretapping has been engaged in to discover marital and business secrets.
4. The Transit Authority placed microphones in its union's headquarters to record their deliberations not long ago.
5. In the *Lanza* case a recording was made of a confidential interview between an attorney and his client in jail, which the court of appeals later said they were unable to prevent being divulged in a legislative hearing.
6. When public telephones are tapped, as they admittedly have been, there is no limit to the invasions of privacy between lawyer and client, doctor and patient, priest and penitent, husband and wife. Opportunities for blackmail become rife.
7. And recently a church deacon in Texas was convicted in Houston for tapping his minister's phone conversation with the church pianist and using the recording to force the minister's resignation.[26]

It is small wonder, then, that Mr. Justice Holmes branded wiretapping as "dirty business."

Unless we grant to our society the right to defend itself by every necessary means against enemies internal and external, there may not be a sacred right to privacy for anybody.[27]

IV. Suggested Improvements in Federal Law Relating to Wiretapping and Eavesdropping

First, Section 605 of the Federal Communications Act should be repealed as outmoded, and a new comprohensive statute enacted long the general lines of the 1957-1958 amendments to the New York law sponsored by the Savarese Committee. Eavesdropping by federal enforcement officers should be permitted only under court orders from federal judges upon a proper showing. Private wiretapping would be prohibited. Evidence illegally obtained by eavesdropping would be inadmissible in any proceeding, civil or criminal. Recording one's own conversations by machine or by secretary or on an extension telephone at either end of a conversation would be legal as under the *Rathbun* case. Penalties for violation of the act by anyone, including law enforcement officers, should be stiff.

Developments in modern electronics make up-to-date legislation imperative. Modern science does not wait for the law to catch up. A laggard federal law and the indifference of Congress have left all of us, especially investigators, in an uneasy spot. Only Congress can eliminate the present evils. *Congress must act!*

[25]See "The Wiretappers" in The Reporter (New York: Fortnightly Publishing Company, Inc., 1955), pp. 1-2; Malin, "Is Wire Tapping Justified?" The Annals of the American Academy of Political and Social Science, July, 1955, p. 29.

[26]Civil Liberties, June, 1958, No. 162, p. 4.

[27]See Mr. Chief Justice Vinson's remarks in *Dennis v. U. S.*, 341 U. S. 494 (1951), at page 509.

The Jury Voir Dire

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STATUTORY competency of a juror is a question of law. The legislation may provide as to the qualifications of jurors so long as it does not unreasonably infringe on the right of a litigant to a jury trial.[1] But when the statutory qualifications[2] have been observed, including residency, age, character and integrity, etc., a juror's competency in a particular case is a question of fact, or a mixed question of law and fact, to be determined by the trial court in the exercise of its discretion. How is the matter of competency, as a question of fact, resolved? By suitable inquiry to determine whether the prospective juror has any foreknowledge, opinion, prejudice or bias which might affect his fairness to render a just verdict.

In *People v. Rendigs*, 205 N.Y.S. 133, 123 Misc. Rep. 32, the following appears at Page 142, of the Opinion:

> "Black's Dictionary defines 'voir dire' as follows:
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> " 'To speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to.'
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> "Bouvier states, under title of 'voir dire':
>
> " 'A suitable inquiry is permissible in order to ascertain whether a juror has any bias, and this must be conducted under the supervision of the court and be largely left to its sound discretion. * * * The court may assume an exclusive examination of jurors, though it is the better practice to allow counsel to examine. *Jones* v. *State*, 35 Fla. 289, 17 South 284'."

Historically counsel asked the questions. In *Pointer v. U. S.*, 151 U. S. 396, 407, 408, 14 S. Ct. 410, 38 L. Ed. 208; and *St. Clair v. U.S.*, 154 U.S. 134, 147, 148, 14 S. Ct. 1002, 38 L. Ed. 936, it was held that the designation and impaneling of jurors is within the control of United States courts by rules, subject to such settled principles of the criminal law as are essential to securing impartial juries. The same principle applies in civil cases. In judicial conference, to forestall what the federal judges classified as the scandalous length and particularity of the examination of jurors by counsel,[4] some trial judges in the federal judiciary conduct the entire voir dire examination under the Rules of Civil and Criminal Procedure for United States District Courts.

One of Illinois' leading contemporary jurists[5] is credited with having remarked that trial counsel too frequently embrace the theory that the prime function of jury instructions is to get the trial judge to refuse a good one tendered in behalf of your client or give a defective one tendered by the opposition, and the chief purpose of the voir dire examination is for counsel to seek to ingratiate himself with the jury! This pointed critism too frequently strikes close to home. Law is a *science*, at least in the broad definition of the term, in that it is successfully practiced only with possession of knowledge, as contrasted with ignorance or misunderstanding.[6] Likewise, it is, defined with similar scope, an *art*, in that it requires skill, dexterity or the power of performing certain actions, acquired by experience, study or observation.[6] Combining these two concepts, and joining them by the mortar of partisanship and advocacy, the resulting perquisite is heavily demanding. But the qualified trial practitioner knows full well the impropriety of conducting a jury voir dire by repeating tiresome statements outlining his theory of the law and propounding tedious rhetorical questions aimed at prejudicing the juror rather than discovering any bias he may have. The experienced trial lawyer knows it is

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[1] *Littrell v. State*, 22 Okl. Cr. 1, 209 P. 184.

[2] For example, see: Section 2, Ch. 78, Illinois Rev. Stat., 1957, *or* Sec. 4-3317, Burns Indiana Stat. Ann.

[3] *Commonwealth v. Sherman*, 294 Mass. 379, 2 N.E. 2d 477.

[4] *Falter v. U. S.*, 23 F. 2d 420.

[5] Anderson, Ben F., Charleston, Illinois. Former Justice, Appellate Court of Ill., 2d Dist., and Senior Circuit Judge, 5th Jud. Circuit of Illinois.

[6] Webster's New International Dictionary, Second Edition, Unabridged, G. & C. Merriam Company, Publishers, Springfield, Mass., U. S. A.

wrong to use hackneyed and repetitious interrogations.

Why, then, is it done? It is an indictment of the profession as a whole. And it is marked by a spiraling quality in that one lawyer oversteps a little; his opposition interposes no objecton but seeks to gain a balance by following the same program in his next set of questions. The first attorney, seeking to regain his fading advantage, pushes the matter a little further. Neither objects because he wants to avail his client of the same advantage. Soon, unless the trial judge intervenes, both lawyers are putting to each juror long, prejudicial and often improper statements, frequently purely philosophical in nature, shoving in, at intervals, "Don't you agree?".

We cannot expect the trial judge to be our gratuitous keeper. Unless we curb ourselves, we may very well force mandatory requirements that only the trial judge shall question the jury on their factual qualifications. The subject has received much current and impressive study.[7] The lawyer who injects in the trial of any case elements not properly within the ambit of a fair voir dire examination does so at the peril of the present voir dire system. First, he opens the door for his opponent to retaliate and the spiraling process begins. Second, continued case after case until it is impressed upon the entire field of trial practice, the first seemingly trivial step may well burgeon into the universal adoption of the federal system.

Now as to the substantive aspect of the jury *voir dire,* the purpose is advisedly stated to be the testing of the juror's qualifications, interest or bias, as a matter of *fact,* and presupposing his statutory competence, viz., age, residency, etc.[8] But the subjacent purpose is to enable the exercise of one's peremptory challenges.[9] In this process, it has been held that proper fields of inquiry include the juror's occupation, habits, acquaintanceships, associations and other factors, including his experiences, which will indicate his freedom from bias.[9]

[7]*Selection of Jurors by Voir Dire Examination and Challenge,* 58 Yale Law Journal 638; *Voir Dire Examination of Jurors: The English Practice,* 16 Georgetown Law Journal 444; *The Federal Practice,* 17 Georgetown Law Journal 13; *Common Sense in Jury Trials, Journal* of the State Bar of California, Oct., 1955.

[8]*Leach v. State,* 31 Ala. App. 390, 18 So. 2d 285.

[9]*People v. Pers,* 362 Ill. 298, 199 N.E. 812; *Watson v. City of Bozeman,* 117 Mont. 5, 156 P. 2d 178.

The peremptory challange, the number of which is limited by statute and will vary between jurisdictions and whether the case is civil or criminal, is, in the nature of the term, available without assigning a reason. Except to preserve carefully one's record of the number used, so as not to seek, with possible embarrassing consequences, to exercise a peremptory challenge after all allowable ones have been exhausted, and except to use consideration and circumspection in the manner of exercising such a challenge, little complication surrounds the matter.

In the exercise of a challenge for cause, however, much more skill and careful exploration is essential. For example, whether the juror has expressed an opinion as to which party ought to prevail would certainly be an important factor. In Georgia the statute on qualifications, cited in the excerpt appearing next below, carries, in certain respects, somewhat more detail than other statutory requirements,[8] and the denial of a trial court to allow interrogation on the opinion aspect was held reversible error in *Padgett v. Padgett,* 63 Ga. App. 70, 10 S.E. 2d 127, where the court remarked on page 128 of the Southeastern citation:

> "The questons which section 59-705 of the Code requires to be propounded to the jurors are: (1) Whether any one of them 'has expressed an opinion as to which party ought to prevail'; and (2) whether any juror 'has a wish or desire as to which (party) shall succeed.' The questions actually propounded by the court to the jurors may have been sufficient to cover the second question, but neither of the questions so propounded was equivalent to the first question set out in the Code section; and, therefore, the questions propounded by the court to the jury did not constitute a putting of the jurors on their voir dire, but, on the contrary, amounted to a refusal to do so. And the denial of that fundamental right at the beginning of the trial rendered the further proceedings in the case nugatory."

But it is noteworthy that the ruling was premised upon the statute cited, for it is the general rule that the mere formation or expression of an opinion with respect to

[10]For example, see: *State v. Patterson,* 183 Wash. 239, 48 P. 2d 193.

the case, irrespective of its source or character, is not, of itself, sufficient to render a juror incompetent. The principle is quite widely recognized. But where the juror states he has such an opinion, and that it is unqualified or fixed opinion, *i.e., one which it would take evidence to overcome,* it is generally recognized that such is a valid ground of challenge for cause.[11] The general rule and qualification thus stated apply to opinions based on newspaper reports,[12] the former trial of a companion case,[13] a coroner's inquest[14] or other source.

Since a juror may not be held disqualified because he has an opinion about the case, unless it be a *fixed* opinion which it would require evidence to overcome, *a fortiori* he is not disqualified by virtue of having some knowledge or information about the case. In *Union Electric Light and Power Co. v. Snyder Estate Co.* 65 F. 2d 297, error was claimed because the court had refused to excuse certain jurors who had read a newspaper article about the case. The court remarked, on page 301 of its opinion:

> "Based on this showing, counsel for plaintiff moved that the panel of prospective jurors be discharged. The motion being denied, counsel for plaintiff then moved that those jurors who had read the article be dismissed from the panel, and this motion was likewise denied. Peremptory challenges were then exercised, and there remained on the jury one juror who had read the headlines, one who had read half the article and two who had read the entire article.
>
> "Regardless of the character of the article, the first motion was properly denied because it asked for the discharge of the whole panel, while only certain of the members of the panel had read the article in whole or in part. *The second motion was also properly denied because a juror is not disqualified from the mere fact that he has learned something of the facts, or of what are printed in a newspaper as the facts of the case.* (Italics supplied.)"

A proper understanding of the jury *voir dire* examination and the rules of law by which it is defined and circumscribed is essential for the successful trial lawyer. The careful exercise of the right of challenge often spells the difference between victory and defeat. And the field is broad in scope and infinitely detailed in development. Special statutory provisions distinguish *voir dire* examinations from one jurisdiction to another. The many collateral aspects beyond the scope of this paper include developments in the matters of the affect of joinder of multiple parties or actions; disabilities of jurors during trial; the order and exhaustion of challenges; the time and manner of interposing objections or exceptions; the conclusiveness of a juror's statement that any opinion he has will not affect his verdict. Intimate familiarity with these and nearly countless other ramified rules is beyond the average scope, without research opportunity which is not present when an unexpected point is suddenly presented during selection of a jury on trial. The best approach, therefore, is to acquire knowledge of the most frequently encountered problems, such as the affect of an opinion, the classes of persons exempt by statute,[15] the consequences of foreknowledge from a coroner's verdict or a newspaper report, and the affect of any racial prejudice.[16] Supplement these rules by testing any other problems by the general principle that anything which directly and unavoidably would deprive a litigant of a fair and impartial trial should ground a proper challenge for cause. Be chary, however, in seeking to exercise such challenge openly unless you are unqualifiedly certain of your ground or well fortified by a reserve supply of unused peremptory challenges so that you may correct the mischief if your cause challenge should be properly disallowed.

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[11] *Caution:* It is good practice to enjoin the prospective juror courteously against stating his opinion. This may be done by prefacing one's question with: *"Without stating what the opinion is,* is it one it would take evidence to overcome?" It is devastating to omit this, and have the juror blurt out: "I think your client is all wrong and my opinion is the defendant (or plaintiff) should win! And it would take evidence to overcome it." Challenge you may. But from eleven to twenty-three other prospective jurors have heard that diatribe. Try to calculate the consequences!

[12] *Union Elec. Light & Power Co. v. Snyder Estate Co.*, 65 F. 2d 297.

[13] *Williams v. Commonwealth,* 85 Va. 607, 8 S.E. 470.

[14] *State v. Olberman,* 33 Or. 556, 55 P. 866.

[15] *For example:* National Guardsmen are exempt from jury service in Illinois under Art. II, Ch. 129, Illinois Rev. Stat., 1957.

[16] *Makey v. Dryden,* (Tex. Ct. Civ. App.), 128 S.W. 633.

Danger of Admitting Liability in an Automobile Case*

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A lawyer receives for defense from his best insurance company client an automobile personal injury case. The investigation file reveals and subsequently taken depositions disclose that the case is practically hopeless from a defense standpoint. The plaintiff's demand is beyond reason and settlement attempts have failed. The case comes on for trial and the jury is in the box. Shall the lawyer admit liability and simplify the issue to one of damages only? Frequently in such a case his inclination is to do just that. Whether or not he should adopt that strategy is the subject for discussion.

The writers of this article say, "Don't admit liability in an automobile case." That is a rule which, like most others, has its exceptions but we think that it applies ninety-nine times out of a hundred. We are talking now about admitting liability at the trial of a jury case. When the matter is in claim stage or even while suit is pending and settlement negotiations are under way entirely different situations are presented.

Preliminary investigations usually enable the insurance company, through its claim department or attorney, to readily catalog some claims as cases of liability and ones which should be controlled and adjusted amicably, if possible. In such a case the adjuster wants to maintain friendly relations with the claimant and he, therefore, avoids a discussion or argument about liability. After suit is filed in such a case and it is referred to the defense attorney it still bears the tag of liability and the attorney is expected to settle it out on a fair basis at the earliest opportunity. In this connection it should be mentioned that the defense attorney should always be on the alert to compromise this so-called case of liability. If there is an inclination to be reasonable on the part of the plaintiff or his attorney, there is no reason to saddle the insurance company with the expense of lengthy discovery procedures. In such cases the claimant's attorney is often willing to furnish enlightening data such as copies of medical reports and receipts or other proof of special damages. He might allow an inspection of hospital records, employment records, Veterans Administration records, tax returns, or other documents of a confidential nature which would otherwise be difficult to obtain. Under such circumstances, the least said by the defendant's attorney about liability, the better.

It is the case where the demand is exorbitant or out of line and the one which must go to trial that is the subject of this paper. It is after all attempts at settlement have broken down and the parties have squared off to do battle in the court room that the rule under discussion applies. The chips are down and every move is taken with care. A shorthand reporter is present to record every mistake or miscue made by the parties and their attorneys. Twelve different jurors are in the box, each listening for his cue as to how to decide the case.

Of course, we want to simplify the issue for each juror if we can, but we must not over-simplify it. We want to project an attitude of fairness and honesty and by comparison demonstrate that it is the other side which is not fair and forthright and which resorts to deceit and exaggeration.

Although a claim may be earmarked at the outset as a case of liability, questionable liability or nonliability, still it is seldom, even in cases of liability, that the driver of an automobile does not have some excuse for his actions which resulted

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in a collision. If the driver has an excuse which satisfies him, how do we know but what it may satisfy the jury or some of the individual members? Jurymen are not the experts in cataloging liability that we are and how frequently have we been amazed, upon talking to jurors after a trial, to learn of the things to which they attached significance and upon which they decided the case.

The hour of decision is after the jury is in the box and the trial has started. Up to that point the case has always been considered one of liability and the disagreement is over the amount of damages. It is that disagreement, however, which gives a clue to what may be expected to develop in the trial. The plaintiff or his attorney have been unreasonable in their demands. That is the reason that no settlement has been made. If the plaintiff is unreasonable it is likely that he will exaggerate his injuries, attribute pre-existing disabilities to this accident or do other similar things to build up his damages. If these fundamental traits are in his character and personality it is likely that they will come out and be made evident in the course of the trial. The jury, observing those traits, may not like them and may not want to go along with plaintiff's exaggerated assertions. For that reason we should leave every hurdle and barrier in the plaintiff's path so that the jury will have adequate opportunity to strike him down and penalize him.

As long as the liability question is in the case the court can give strong defendant verdict directing instructions which are at times very effective. Just how effective they are in a particular case is not a matter which is covered in the published reports. The propriety of the giving of the various instructions is discussed fully in the appellate opinions, but the effect or influence of a certain instruction on a particular jury or juror is not a matter of record so we cannot cite the reported cases on this proposition. We can only recount some personal experiences to bear out our conclusions.

We have in mind a case where at first blush it would seem that the defendant cannot possibly say anything helpful to his cause. Upon seeing defendant and hearing his story, we think, "What is the use, let's admit liability and just try the issue of damages."

The insured defendant after spending a long evening in a tavern got in his car and proceeded to a controlled intersection which he entered with the green light and then turned left. He struck and knocked down two pedestrians who were crossing with the light and in their proper crosswalk. Defendant did not see them until after the impact. He has a ducktail haircut, wears a leather motorcycle jacket and cap, and his driver's license shows prior convictions of careless driving on state charges. It appears to be almost a hopeless case. On the other hand, the two plaintiffs, a man and women each married, but not to each other, say that they met casually that evening at a restaurant where they had just gone for a snack; that it was just by coincidence that they happened to be walking along together at 12:30 o'clock in the morning. They denied having had anything intoxicating to drink. It may not be possible to get specific testimony to the contrary, but suppose that by some subtle innuendo the jury is caused to wonder whether the plaintiffs too did not spend the evening in a tavern. It may then be pointed out that the defendant is at least frank and forthright in admitting where he spent the evening and if he gets a haircut and wears some suitable clothes, he may very well get complete justice at the hands of the jury. If defendant admits liability he limits his opportunity to bring out some weaknesses in the plaintiff's cases. In this instance if liability is admitted and the issues are confined to injuries, these plaintiffs will stand in the same shoes as would persons run down leaving an evening prayer meeting.

In another case, with a little different set of facts, we think that defendant acted wisely in admitting liability. Defendant, after having spent the day in cocktail lounges, belatedly, in a flurry of speed took off for the next place on his itinerary. Before he got out of town he was up to 45 miles an hour and oblivious to the fact that the signal light was red for him at an intersection. He collided with a car occupied by a man, his wife and three small children which was crossing the intersection with the green light. The woman received some broken ribs but outside of bruises, contusions and sprains the others were not severely injured. They employed a competent damage suit lawyer who promptly filed suit for each of the

five persons plus husband's and parents' loss of services actions. The cases were removed to the federal court and consolidated for trial. Plaintiffs' counsel, aware of the poison which he thought he had at his disposal, demanded in excess of $20,000.00 in settlement. He was quite confident of making a punitive recovery althought he had not sued for punitive damages. At the start of the trial but out of hearing of the jury defendant's counsel announced that he was admitting the liability of defendant and asked the court to caution plaintiffs' counsel to make no reference to the facts relating to liability, namely, defendant's intoxication, his running a red light and matters of that nature. The court complied and instructed plaintiffs' counsel to confine his witnesses' testimony to the issue of damages. Plaintiffs' counsel was thrown off stride having arranged for the attendance of eleven strong liability witnesses whereas his medical evidence was weak. The outcome of the trial was assessment of damages to the various persons in amounts ranging from $200.00 to $2,500.00 and a total amount of $4,600.00. The strategy of admitting liability in that case was most effective and gratifying to defendant. That is the only case, however, in our own experience where we believed that we found the circumstances to be just right to adopt that tactic. Also we were fortunate in the fact that the judge exercised his discretion in excluding the evidence on liability. On other occasions the court might not rule so favorably even after the admission is made.

We recall some other experiences where originally defendant was inclined to admit liability but decided otherwise. One such is a case where plaintiff and his wife were driving along the highway at moderate speed. The only other vehicle in view ahead was a car going the same direction which slowed down to make a right turn into a farm driveway. Plaintiff slowed down and moved over into the left lane to go past the turning vehicle as it left the pavement. Then as plaintiff moved back into his right hand lane he was struck from the rear by defendant's oil truck. Plaintiff's car was catapulted off of the highway, went over a rock pile and finally came to a stop a considerable distance from where it was struck but still on its wheels. The oil truck had come up from behind unbeknownst to plaintiff, and the truck driver, according to his testimony, thought plaintiff was going to make a left turn off the highway when he crossed to the left side, so the truck continued on at full speed. At the conclusion of the evidence defendant offered and the court gave an instruction on contributory negligence based on plaintiff's moving from one side of the highway to the other without giving signals and without looking to see whether those movements could be made with safety. The propriety of that instruction might be questioned, but nevertheless after the jury had been deliberating for four hours it sent word to the judge that it wanted clarification of that contributory negligence instruction. Thus, during all of that long period of time, the jury was arguing liability in a case which most of us thought the liability was not subject to controversy. To understand why there was this disagreement among the jurors, we have to explain more about the case. Plaintiff had received a severe back injury in another accident a few years before. He had had a workmen's compensation claim and several claims under accident insurance policies during the pendency of which he had written numerous letters and furnished medical reports stressing the severity of that prior injury. Then, when he had the accident with the oil truck, he immediately became disabled, but in the course of his hospital and medical treatment, he did not disclose that prior injury. When it was brought out in the trial and plaintiff was pressed for an explanation his attempt to differentiate the two injuries was feeble; as a result some of the jurors were ready to give him nothing. Those that felt that way used the contributory negligence instruction to support their argument. The defendant company did not get a verdict in that case but it had some very strong advocates on the jury who were able to mitigate the damages.

An instance where a strong burden of proof instruction probably influenced the jury's decision is a case where plaintiff, a woman four months pregnant, was driving home in heavy rush hour traffic. Cars were stopped and backed up for a block or so from signal lights ahead. Defendant ran into plaintiff's car from the rear doing some, but not extensive damage. Defendant testified that she was driving about two car lengths behind plaintiff and that

she glanced away toward the shop windows for a moment. When defendant looked forward again, plaintiff's car was stopped immediately ahead and too close for her to be able to stop. Plaintiff began spotting blood that evening but continued at her employment for a month before hemorrhaging became severe enough that she had to go to bed. Thereafter she went to the hospital, had a number of blood transfusions and delivered her baby at six months. Both plaintiff and defendant were charming people and there was no character impairment to influence the decision. Plaintiff's obstetrician was inexperienced on the witness stand, hypertechnical about the wording of questions which he would answer and, although he wanted to help plaintiff, he failed to satisfactorily connect plaintiff's difficulties with the accident. This trial was in federal court and the judge in his charge to the jury emphasized the necessity of plaintiff sustaining her burden of proof in every facet of the case. The verdict was for defendant, although certain minor damage was conceded. Thus it was the finding of no liability in a case which we would readily catalog as one of liability that sustained the result.

When we describe a case as being one of liability we mean that it is one where other factors and influences being equal plaintiff will usually recover from defendant. In other words, it is a case where the law of averages operates heavily in favor of plaintiff in that same or a similar fact situation. This does not mean that plaintiff has an absolute cinch, because there is no cinch in a tort case. Automobile tort cases depend upon oral testimony, so the credibility of the witnesses is an important factor. For that reason, the courts do not direct verdicts for plaintiff as they sometimes do in cases bottomed upon written instruments. Thus the character and personality of the plaintiff, of his lawyer and of his witnesses are all imponderable factors which go into and influence the decision of the jury.

Cases of liability are not all of the same caliber and there may be some disagreement as to how to classify them. In our opinion rear end collisions in traffic are much easier to excuse and raise doubts in the jury's mind than are cases resulting from running stop signs, running red lights, driving on the wrong side of the road or hitting parked vehicles. The automobile driver stopping in traffic owes a duty to operate his vehicle in a careful manner, and if he finds himself obliged to stop suddenly he must give adequate warning to the driver behind. The issue of contributory negligence and the instructions submitting this defense are therefore very important in the so-called rear end collision cases but may not apply to other types of liability cases at all. However, we must not forget that any excuse which the defendant driver has in his mind may likewise be considered as adequate in the minds of the jury. If the jurors can be made to feel that they themselves could have gotten into a situation where they would have done as the defendant did, the case can be won even though that excuse is inadequate in the eyes of the law. The average juror is not experienced or conditioned by long legal training in cataloging cases as to liability, nonliability or questionable liability and it is a mistake for the defense or prosecution to make such an assumption.

If plaintiff charges reckless and wanton negligence and is suing for punitive damages, little if anything can be gained by admitting liability. This is common practice in some jurisdictions where there is extreme intoxication and aggravated negligence. The poison which plaintiff might otherwise keep out is material and admissible in such cases. In one such case we have seen the issue of negligence more or less ignored but not expressly admitted and the damage issue was contested strenuously and quite successfully. The attorney simply told the jury that the principal issue was the amount of plaintiff's injury and proceeded to concentrate the whole defense on that issue. He did not put the defendant on the stand which would have subjected him to having to recount the prejudicial features of the case. The defense was entitled to and did give the usual defendant's verdict directing instructions. Although the defendant was intoxicated at the time of the collision and left the scene of the accident the verdict for plaintiff was for a minimal amount. The case demonstrates that a jury of twelve of our fellow citizens is not necessarily going to exact a penalty from an unfortunate defendant and give the proceeds to a plaintiff who has exaggerated and fudged every way he can to enhance his damages.

We have been considering reasons for

not admitting liability as it might affect the jurors, but we would like also to suggest that an admission of liability limits the defense in the points that it can raise in post trial motions and on appeal. If that issue is eliminated the opportunities for the court to commit error are reduced that much. Sometimes, with a high verdict against us, we need every possible error for the commission of which we can ask relief.

One last thought in connection with the few instances where admission of liability might be indicated. An attorney provided by defendant's insurance company should obtain the defendant's authorization before admitting liability. If liability is admitted and the damages assessed are greater than the insurance coverage, the defendant may have a very legitimate complaint against the attorney and the company, and one which might subject them to liability for the excess. The provisions in the policy permitting the company to settle or defend do not authorize the company to make a legal admission on the part of its policy holder to which he does not assent and which may affect him adversely as to matters for which he is not protected in the policy.

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

Compensation Factor in Low Back Injuries*

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The histories of 509 patients treated for low back injuries were studied for differences that might be related to compensation. Only 55.8% of the 272 patients receiving compensation were rated as improved at time of discharge, as compared to 88.5% of the 237 patients not receiving compensation. Over two-thirds of the patients who did not receive compensation had appeared for treatment during the first month of symptoms, whereas only about one-half of the patients who received compensation had been seen at this point. The mean number of treatments received by the compensation group, both men and women, greatly exceeded that for the noncompensation group. Some patients in the compensation group responded well to conservative management and returned to their jobs after a minimum number of treatments, but in others there appeared to be a difficulty within the basic personality structure. Psychiatric experience with the latter type has not been encouraging. Throughout the study, the women expecting compensation showed the worst response to treatment while receiving the greatest number of treatments. Prompt adequate diagnosis and early adequate conservative treatment are recommended as essential in handling these patients, but there is real need for further investigation of the medical, psychological, and legal aspects of this complaint.

IT HAS long been the impression of physicians who treat back injuries that patients receiving compensation are often more difficult to cure than those who are not eligible for such benefits. We felt that it might be of interest to see if this clinical impression could be substantiated by studying similar groups of patients with and without compensation who received the same treatment and to determine what factors might be involved.

Over 500 patients treated in the physical medicine department of Baylor University Hospital during a five-year period were used for the study. Of the 509 patients, it was found that 54% were eligible for compensation and 46% were not, which represented a sufficiently equal distribution for our study. As might be expected, there were many more men than women in the compensation group. Patients not receiving compensation were about evenly distributed with regard to sex (table 1).

TABLE 1.—*Number and Percentage of Patients Receiving and Not Receiving Compensation for Injury*

	Sex	Patients No.	Patients %
Receiving compensation	M	213	42.0
	F	59	12.0
Not receiving compensation	M	116	22.8
	F	121	23.2
Total		509	100.0

The majority of the patients were referred for physical therapy by other physicians, mostly orthopedic surgeons or neurosurgeons, who had initially established the diagnosis of low back pathosis due to injury. Many of the patients had already received some treatment, such as bed rest at home, some form of heat, or back manipulation, prior to referral.

Only those patients were included in this study who received a minimum of at

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least five treatments, for three reasons: 1. Patients who became symptom-free with fewer than five treatments might well have improved without treatment. 2. The group receiving fewer than five treatments included many patients who had severe lesions requiring surgery and were therefore not suitable candidates for conservative management. 3. Patients who came to the physical therapy unit less the five times provided small opportunity for follow-up.

Symptoms

Only patients with an acute back injury, that is, those who could relate the onset of symptoms to a particular incident, were included in this study. The most common symptom was pain in the lower back, often with radiation into one leg and sometimes into both legs. Many patients complained of back pain after coughing or sneezing. Almost all patients demonstrated some degree of limitation of straight leg raising. The majority did not exhibit any significant diminution of deep tendon reflexes. Many patients noted numbness to pin prick over portions of the lower extremeties, though this usually did not conform to dermatome distribution. Few patients had true weakness of the dorsiflexors of the foot. Nearly all had limitation of back motion, ranging from that noted only on testing to constant assumption of the flexed position. No effort was made to exclude patients with a clinical diagnosis of possible ruptured intervertebral disk, although the most common diagnosis was muscular or ligamentous sprain.

Treatment and Hospitalization

Although one might expect that more patients with compensation would receive hospitalization than those without, this was found not to be true in this series. In the compensation group 73% were hospitalized, and in the noncompensation group 76% were hospitalized. If hospitalization can be taken as an index of the severity of symptoms and thus of the severity of the injury, there existed essentially no difference between patients receiving compensation and those not receiving compensation in this regard.

The majority of the hospitalized patients were at bed rest in the jackknife position, some with leg traction, and many received muscle relaxants. In the Physical Medicine Department, treatment for the patient with low back injury was started with 30 minutes of heat, usually short wave diathermy unless contraindicated. An effort was made to position these patients comfortably either in a side-lying position with the knees flexed or in the prone position with ample support under the abdomen in the form of pillows so that the back was semiflexed. The heat treatment was followed by massage of the deep sedative type, as tolerated by the patient. Some patients also received electrical stimulation to the involved back muscles.

As soon as the patient had passed the most acute stage, low back flexion exercises were added. It was usually most satisfactory to start these exercises with the patient lying supine with hips and knees flexed in order to eliminate the extensor action of the iliopsoas muscle on the lumbar spine. In order to flex or flatten the lumbar spine, the following exercises were used: 1. The simplest exercise was contraction of the gluteus maximus muscles, also called "pelvic tilt." 2. The next exercise consisted of flexion of the neck and upper trunk through a limited range, resulting in strengthening of the abdominal muscles, and also flexion of the lower spine. The range was carefully limited in order to avoid contraction of the iliopsoas and resulting extension of the lumbar spine. 3. The last exercise consisted of passive hip and knee flexion. This was done from the same position by having the patient grasp his knee with both hands and pull it toward his chest, first one leg at a time and finally both simultaneously. All exercises were carefully graduated and were performed "to the point of pain" only.

As the patients' conditions improved, they were also taught the basic principles of proper body mechanics to enable them to avoid extension of the low back in all forms of activities, such as sitting, walking, and lifting. Exercises involving hamstring stretching, such as touching the toes with knees extended either sitting or standing, were generally avoided.

Results of Study

The patients in each group were analyzed with regard to the following factors: improvement following treatment, duration of complaint before treatment

was started, relationship of the duration of symptoms before treatment to the results of treatment, number of treatments received, and results of treatment at late follow-up.

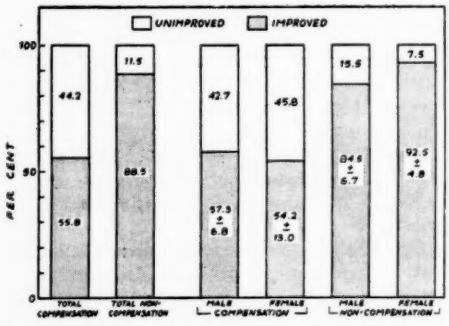

Fig. 1.—Results of treatment in patients who received compensation and in those who did not.

Results of Treatment.—The results of treatment were classified as either improvement or no improvement largely on subjective grounds, since objective improvement is of little value if the patient is having too much pain to return to work. Thus, a patient was considered unimproved if he or she continued to complain and failed to resume normal activities, including work, regardless of objective improvement. This method has previously been used in many studies of the management of low back pain.[1]

Figure 1 shows a comparison of improvement for patients who received compensation and for those who did not as a whole and also for each group divided according to sex. Only 55.8% of the patients receiving compensation were rated as improved at discharge, as compared to 88.5% of the patients not receiving compensation. The observed difference in improvement between men who anticipated compensation and those who did not was 27.2%, while the difference to be expected on the basis of chance was only 9.6%. For the women, the observed difference was 38.3%, while the expected difference was only 13.8%.

Duration of Complaint Before Treatment.—Figure 2 shows that over two-thirds of the patients who did not receive compensation, both male and female, had appeared for treatment during the first month of symptoms, whereas only about one-half of the patients who received

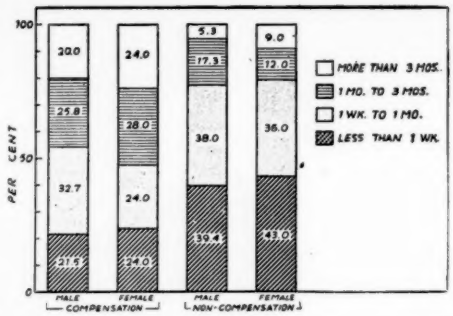

Fig. 2.—Duration of complaint before treatment in patients who received compensation and in those who did not.

compensation had been seen at this point. Less than one-tenth of the first group were referred to the department after more than three months of symptoms, but over one-fifth of the second came for treatment over three months after injury.

Correlation of Results with Duration of Symptoms.—Figure 3 shows the percentage of patients improved for different durations of complaint both for those who received compensation and for those who did not. Both groups showed a definite decrease in improvement among the patients appearing for treatment after more than one month of symptoms. This drop was especially marked in the compensation group.

The fact should be noted, however, that even the patients who received compensation who were seen for physical therapy during the first week after injury did only slightly better than those who did not receive compensation who were seen three or more months after their injury. Thus, though the patients, in general, responded better to treatment when it was initiated early, this factor was not the only key to the recalcitrant symptoms of the patient who received compensation.

Number of Treatments.—The number of treatments the patients received varied from the accepted minimum of 5 to 91. The mean number of treatments was calculated for each of the four groups. There was a striking similarity between the mean number for men (18) and women (18.3) in the compensation group and those for men (9.8) and women (11.1) in the non-compensation group. As can be seen, both men and women in the compensation group received a significantly greater num-

ber of treatments than did their counterparts in the noncompensation group (observed difference among men, 8, and among women, 7). Over one-half of the patients receiving compensation were dismissed from physical therapy after 13 treatments; over one-half of the patients not receiving compensation were dismissed after 9 treatments.

An attempt was made to correlate the number of treatments with improvement, but unfortunately no definite relationship could be established. The mean number of treatments for patients who showed improvement essentially did not differ from that for those who did not in the same group or from that of the group as a whole.

The mean number of treatments was also correlated with the duration of symptoms before treatment was started. Figure 4 shows a definite relationship in the compensation group; those who waited the longest before treatment received the greatest number of treatments. The correlation for the noncompensation group was not so significant because of the small number of patients in this group who had symptoms for more than three months before treatment was started.

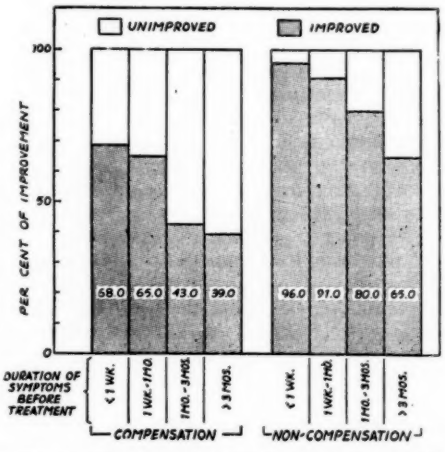

Fig. 3.—Correlation of results of treatment with duration of symptoms in patients who received compensation and in those who did not.

Late Follow-up.—A late follow-up on the results of this study was obtained from the records of the referring physicians, either on discharge of the patient or on the last office visit. This included 358 of the 509 patients in this series, and these results are shown in table 2. The time lapsed after dismissal from physical therapy varied from a few weeks to several years. When the patients who had had surgery were excluded from the evaluation, the percentage of patients showing long-term improvement was similar to that shown originally. Figure 5 shows that the follow-up results tended to get slightly better for patients not receiving compensation, while those for the patients receiving compensation tended to become somewhat worse.

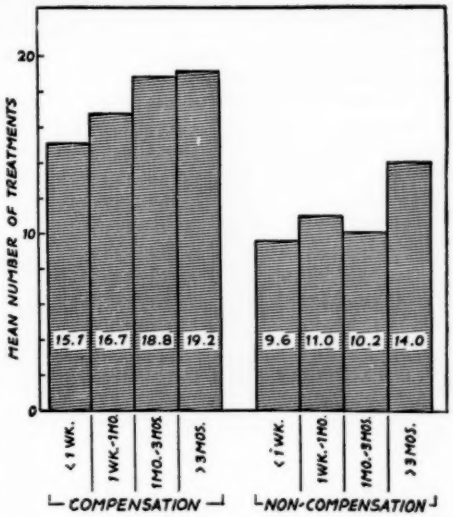

Fig. 4.—Correlation of duration of symptoms with number of treatments in patients who received compensation and in those who did not.

Comment

The results obtained in this study of 88.5% improvement among patients not receiving compensation are similar to those of Coyer and Curwen,[1a] who reported 88% of their patients as improved; Breck and Palafox[1c] reported 87% of patients improved, and Haggart and Grannis[1d] reported 91% improved. However, the improvement of 55.8% found among our patients who received compensation is far different from that of 87% reported by Jessup and co-workers.[1b] In this regard, it must be emphasized that the patients of these other observers were all ambulatory and were treated at work, while three-fourths of the patients in this study were hospitalized. This reflects a probable dif-

ference in extent of injury. Our study may have excluded many of the patients with minor injuries by the imposed minimum of five treatments.

Results show that the longer a patient waits before treatment the smaller is the probability of his improving, regardless of whether he expects compensation or not, and that generally the patients who receive compensation are referred for treatment later than those who do not. The reasons for this are hard to explain; certainly they are not financial, and the delay may cause many undesirable consequences. Admittedly, the more severely injured patients are eventually hospitalized for an intensive treatment program, but one gets the impression that many of these patients receive inadequate therapy for a prolonged period of time. Even when an attempt is made to give physical therapy, this frequently consists of the application of heat from a heat lamp or diathermy machine alone. This is certainly not adequate, but the patient considers it to be "physical therapy," and, when he is finally referred for more intensive treatment, he has developed a prejudice against physical therapy which must be overcome. From this standpoint, it would often be preferable if these patients received no treatment rather than inadequate therapy, and certainly the latter should not be continued over prolonged periods of time. Otherwise, many patients become extremely resentful toward their employers, their doctors, or both and lose their motivation to return to work. If a doctor is treating a patient without being able to provide an intensive treatment program, there appears to be a danger point at about one month, after which results of treatment fall off sharply for patients in the compensation group.

TABLE 2.—*Percentage of Patients Available for Late Follow-up Study, with Results*

	Receiving Compensation		Not Receiving Compensation	
	M	F	M	F
Total, %	53.0	66.0	64.0	61.0
Patients with surgery, % of total	21.6	11.1	14.2	12.1
Patients improved at late follow-up, %	44.2		91.1	
Patients improved at immediate follow-up, %	55.8		88.5	

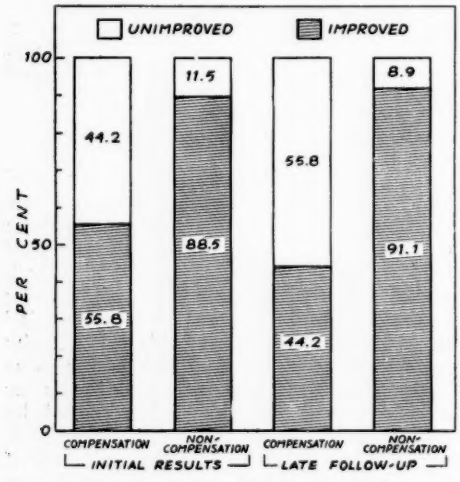

Fig. 5.—Comparison of results of treatment at immediate follow-up and at late follow-up in patients who received compensation and in those who did not.

Although results are worse for patients who are referred for treatment after three months or more, it is usually still advisable to give them a trial of adequate treatment, since it has been shown that over one-third of them can be improved sufficiently to return to work. Of course, if the same treatment could be provided within the first week after injury, almost twice as many would recover. Providing the patient with early treatment is especially important if he is receiving compensation. Another factor in successful treatment is an early, adequate preparation by the physician. The earlier an accurate diagnosis as to the need for possible surgery can be obtained the easier it becomes to treat the patient. It is not an uncommon experience for a patient to get well after myelography failed to demonstrate any obvious defect. This should not be interpreted as a recommendation for routine myelography, since many patients become disabled by the mere insertion of a needle into the spine. However, in questionable cases, better results would undoubtedly be obtained more quickly if this procedure were done. In this respect, electromyography may prove helpful when it becomes more generally available. Shea and co-workers[2] have shown the possibility of demonstrating intervertebral disks with this technique. In our own experience, electromyography has proved a definite advantage in that it does not require lum-

bar puncture and insertion of radiopaque material and thus eliminates some of the physiological and psychological trauma of the diagnostic procedure. Of course, even a person with a small protruded intervertebral disk can often be treated conservatively, and, as Barr[3] pointed out, the results are not necessarily proportional to the size of the defect. However, if conservative management fails to provide relief, it is best to resort to surgery promptly.

In the analysis of the number of treatments received by patients, we were unable to determine an optimal number of treatments, since there was no correlation possible between results of treatment and the number of treatments given. Although there may be no ideal treatment time, we feel from our clinical impressions that a series of 18 treatments or a period of three weeks of intensive care, including bed rest and adequate physical therapy, constitutes a fair trial of conservative management. Of course, if the patient is improving under this program, treatment should definitely be continued. But a patient who does not get any relief from these measures during that period should be viewed with considerable concern. He probably requires surgery, or perhaps his psychological problems are so fixed that little help can be expected from further treatment.

Apparently, as a group, the patients suffering acute back strain who receive compensation present different psychological problems from those who do not receive compensation yet whose injuries may be the same. Yet some patients in the former group respond well to conservative management and return to their jobs after a minimum number of treatments. The difficulty appears to lie within the basic personality structure of the individual receiving the injury. For some patients, a back injury seems to present a way of "getting back" at the employer. Once a cash settlement is made, the back pain and disability often subside rapidly. However, with rare exceptions, these patients are not malingering; rather, they seem to be suffering from a compensation neurosis. In the patient who receives compensation it is always important to watch for evidence of emotional problems. In our series, the most common symptoms noted were neck tension syndrome with its associated headache, dizziness, paresthesias of the upper extremities, and visual difficulties and, also, such symptoms as blackouts, gastrointestinal upsets, bizarre paralyses, and extreme nervousness.

The question arises whether psychiatric treatment would be of help in overcoming the problems of patients with a compensation neurosis. Unfortunately, the usual experience is that these patients go to a psychiatrist only with extreme reluctance. Even if the patient can be persuaded to go, the main function of the psychiatrist is usually to confirm the presence of either an anxiety state or a hysterical reaction. The patients are generally not good candidates for psychotherapy, and the psychiatrists are generally understandably reluctant to treat them.

In this regard, physical therapy often can do more than directly affect the injury to the muscles and ligaments of the back. Adequate physical therapy may provide an "out" for the patient's psychological problems if it is started early enough and carried out properly. In our experience, it is well to encourage this effect by the general approach to the patient. Such an approach consists of maintaining from the outset the attitude that the back disability is only temporary and of recommending early settlement of the case, as also was suggested by Fetterman[4] and Jones.[5] It appears that one can safely recommend early financial settlement to the patient with provision for surgery if it be needed, since the passage of time does not greatly change the results of formal physical therapy in the majority of patients.

It might be advisable to stress that "early" settlement refers to prompt settlement after diagnosis and a fair trial of adequate treatment and not to settlement immediately after the injury. If an insurance company attempts settlement immediately, the patient often develops a far greater psychological problem, since he has the feeling that the company is trying to "put something over" on him and is not giving him a fair chance of recovery.

It was interesting to note that, throughout this study, the women expecting compensation for their injuries have shown the worst response to treatment, while receiving the greatest number of treatments. Apparently, many of them resent the fact that they are required to hold a job, and there seems to be no motive for the women with compensable back in-

juries to return to work. On the other hand, the women with noncompensable back injuries show more improvement than the men, perhaps because there might be less undesirable pressure on them after recovery. In discussing the work of Haggart and Grannis, Aitken[1d] noted this same unfortunate trend in the women who were industrial workers and who underwent intervertebral disk surgery. Among 36 women, only 4 ever returned to work. These patients are truly discouraging to work with, both as a group and as individuals.

The compensable back injury is so common and its economic implications are so far-reaching that there is a real need for further investigation. For the present, the following suggestions may be of value in handling these patients: The employer should make every effort to provide prompt accurate diagnosis and early adequate conservative treatment. The insurance company should maintain a cooperative attitude toward the patient's treatment program. Litigation should be avoided if at all possible, since the engaging of a lawyer often seriously retards the patient's recovery. The physician should encourage an early settlement.

Summary

Among 509 patients with acute low back strain treated by conservative means, 54% were eligible for compensation and 46% were not. Patients who received compensation were referred for treatment longer after their injury than were patients who did not receive compensation. Eighty-eight per cent of the latter group improved with treatment, as compared to only 55.8% of the former, and patients with compensation received a significantly greater number of treatments than did those without, although hospitalization was similar for both groups. There was a correlation between the duration of symptoms before treatment and lack of improvement, and results of treatment at late follow-up were very nearly the same as those at discharge from physical therapy.

References

1. (a) Coyer, A. B., and Curwen, I. H. M.: Low Back Pain Treated by Manipulation: Controlled Series, Brit. M. J. 1:705-707 (March 19) 1955. (b) Jessup, R.; Murray, R. J.; and Rossi, A.: Management of Low Back Pain in Ambulant Patient, Am. Pract. & Digest Treat. 5:792-795 (Oct.) 1954. (c) Breck, L. W., and Palafox, M.: Conservative Treatment of Lumbosacral Backache: Outline of Flexion Management and End-Result Study, Clin. Orthop. 5:41-61, 1955. (d) Haggart, G. E., and Grannis, W. R.: Management of Low Back and Sciatic Pain, Am. J. Surg. 85:339-346 (March) 1953. (e) Wilson, R. N., and Wilson, S.: Low Backache in Industry: Review of 1,163 Cases, Brit. M. J. 2:649-652 (Sept. 10) 1955.

2. Shea, P. A.; Woods, W. W.; and Werden, D. H.: Electromyography in Diagnosis of Nerve Root Compression Syndrome, Arch, Neurl. & Psychiat. 64:93-104 (July) 1950.

3. Barr, J. S.: Low Back and Sciatic Pain: Results of Treatment, J. Bone & Joint Surg. 33-A:633-649 (July) 1951.

4. Fetterman, J. L.: Vertebral Neuroses, Psychosom. Med. 2:265-275 (July) 1940.

5. Jones, M. L.: Backache in Industrial Injuries, Wisconsin M. J. 44:1069-1070 (Nov.) 1945.

Barbiturates, Automatism* and Suicide

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CARBON monoxide excepted, the barbiturates are the commonest agent for suicidal purposes today[1]

The parent of the barbiturates is barbituric acid. This acid has given hundreds of derivatives, but about twenty are therapeutically useful. Each derivative has a chemical and registered name and is usually sold under its registered name. All have the same therapeutic action, but each has an individuality. Barbiturates are used therapeutically as sedatives, hypnotics and as anticonvulsants. They are a principal therapeutic agent in the control of convulsions in epilepsy. Some of the series are used as anesthetics and as adjuvants with analgesics.

Barbiturates have been classified according to the speed of their therapeutic action into:

1. Long acting; e.g., alurate, barbital, dial, ipral, neonal, and phenobarbital.
2. Intermediate acting; e.g., amytal, ortal, pernoston, and sandoptal.
3. Short acting; e.g., epival, nembutal, and seconal.
4. Very short acting, used intravenously as an anesthetic; e.g., epival, pantothal sodium, and thioethamyl.

The rapidity with which barbiturates act on the body depends upon (1) the nature of the dervative as to whether it is long, intermediate, or short acting, and (2) upon the method of administration. Oral administration is the most common method, and the one of choice, unless contraindicated. Oral administration only will be discussed.

The short acting barbiturates are usually prescribed for insomniacs, who do not fall asleep readily. The long acting ones may be prescribed for patients who have no difficulty falling asleep but who wake up in four or five hours.

The amount constituting a lethal dose varies widely with the class of barbiturate used. Physicians generally agree that the toxic dose of a barbiturate is five to ten times the full therapeutic dose. A fatal dose is usually ten to twenty times the therapeutic dose. Recoveries from massive doses have been reported.[2]

The following table gives some facts about a few barbiturates used clinically.

Name	Class	Average Time Required to Induced Sleep	Average Therapeutic Dose	Approximate Lethal Dose
Pentobarbital (Nembutal)	Short acting	5-10 mins.	0.1-0.2 gm.	2.5 gm.
Secobarbital (Seconal)	Short acting	5-10 mins.	0.1-0.2 gm.	2.5 gm.
Amobarbital (Amytal)	Intermediate acting	10-15 mins.	0.1-0.3 gm.	2.3 gm.
Barbital (Veronal)	Long acting	20-30 mins.	0.3 gm.	5-20 gm.
Phenobarbital (Luminal)	Long acting	20-30 mins.	0.03-0.1 gm.	6-9 gm.

*The psychologic definition of automatism is any action performed without the doer's intention or knowledge.

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[1]Goldstein, S. W., J. Am. Pharm, Assn., p. 11, Jan. 1947; Tatum, A. L., Physiol, Rev., p. 489, Vol. 19, 1939; Goodman, L. S. and Gilman, A., The Pharmacological Basis of Therapeutics, Sec. Ed., p. 146; Hunter, R. A., The Lancet, p. 58, July 10, 1954; Stengel, E., Procedures of Royal Society of Medicine, 45:16, 1952: "In Great Britain the enormous increase of suicidal attempts with barbiturates is obviously related to the increased availability of sedatives since the institution of the National Health Services in 1948."

[2]Hambourger, W. E., J. A. M. A., 114, 2015, May, 1940; Geraghty, F. H., Medical Clinics of N. A., p. 415, March, 1941.

Deaths resulting from an overdose of barbiturates frequently present medicolegal problems. Hence, it is of medicolegal importance to determine whether the barbiturate ingested was a long or short acting one and how rapidly it would induce sleep.

An interesting psychologic symptom of barbiturate poisoning was presented by Robert Richards, M.D. in 1934[3] which he was pleased to call "automatism". This symptom, wrote Richards, was most easily described through three cases.

> "1. A professional man, aged 42, was taking dial tablets (each 1½ grains) for insomnia. He took one tablet and, failing to fall asleep, took a second. From that time he lost all knowledge of what he was doing, and apparently went on taking further tablets at intervals until he had emptied a complete tube of ten. He slept for thirty-six hours, and on waking had no recollection of taking more than two of the tablets.
>
> "2. A nurse, aged 35, had a precisely similar experience, also with dial, in her case emptying a tube in which were eight tablets, again without any recollection of having taken more than two.
>
> "3. Another professional man, aged 76, who was in the habit of taking veronal (7½ grain tablets) swallowed in a similar way eight of these tablets, and after sleeping for twenty-four hours assured me he had had only two, at intervals of one hour between the doses."

None of these cases show whether these tablets were taken one after another or were taken all at one time after the second tablet was taken.

"It would appear", wrote Richards, "that the knowledge of the need for another tablet persists, while the memory is so affected by the drug that the patient does not realize that he has already satisfied the need, and automatically repeats the dose at intervals. Though all three patients recovered it has to be noted that in each instance the available supply was exhausted, and had a larger quantity of the drug been at hand there is no reason to believe it would not have been all taken, with possibly fatal results."

The literature following Richards' announcement of automatism has generally made no distinction between the effect of long acting and short acting barbiturates. In each of Richards' cases the patient had no recollection of having taken more than two tablets. Richards has not given the background of his patients. He has overlooked the motive or reasons that these persons may have had to make the statements attributed to them.

On the facts presented by Richards it is not suggested that any of his patients attempted suicide. But when a man takes more than a therapeutic dose of a barbiturate, is found unconscious, has a stay in a hospital and some unpleasant newspaper publicity, he will try to give an explanation for his conduct. How easy it is to say, "I only remember taking two tablets."

Attempted suicide is a crime by statute in some states and a crime at common law in others.[4] It is a crime in the British Isles under the common law, and in Canada the criminal law makes it a crime to attempt to commit suicide. Suicide and attempts thereat are definitely condemned by ecclesiastical law.

If no prior attempt is known and no note has been left indicating suicide, it is simple enough to say, "I remember taking only two tablets." The would-be self murderer, snatched from death by timely discovery and effective treatment, has fears growing out of social relationships. It is the fear of the speech of people and how they would disparage and persecute. The would-be suicide does not want to recognize that his own behavior is responsible for loss of social status. He is quite ashamed of his act and desires the good opinion of others, which he fears will be denied him if his action is known. How easy it is to say, "I remember taking only two tablets."

Death by suicide should concern the physician no less than death from heart disease or cancer. The physician should not brush off the act of taking an overdose by suggesting or accepting an easy explanation.

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[3]Richards, Robert, The British Medical Journal, p. 331, Feb. 24, 1934; reprinted in C. M. A. J., p. 422, April, 1934.

[4]N. J. S. A., 2A:85-1, 2A:85-7. See *States v. Carney*, 69 N.J.L. 478, 55 Atl. 44; N. D. Revised Code, 1943, 12-3302; Okla. Stat., 1951, pp. 812, 818; S. D. Code, 1939, 13.903; See Ark. Stat., 1947, 1-101, 41-107 relating to common law offenses; Idaho Code, 18-303 relating to common law offenses; See Laws of Mich., 1948, Sec. 750.505 relating to common law offenses.

Locker and Angus,[5] reviewing sixty-four consecutive cases entering Old Church Hospital in Rumford, England, in the four preceding years, found forty-nine at least were suicidal attempts. In fifty-two cases of this group, barbiturates were the chosen agents. It is significant that out of fifty-two cases not one of automatism was found. "In all, forty-seven patients definitely admitted to an attempt to take their own lives, and the two patients who died left messages behind; then there were forty-nine definite suicidal attempts among the patients. Of five patients who categorically denied any suicidal attempt, one had made two previous attempts and had been certified to a mental hospital and one had been a voluntary patient with a depressive state. Eleven patients had been or were prepared to be, voluntary patients in mental hospitals, and four had been, or on recovery from the barbiturate were, certified insane. In nineteen cases the psychiatrist expressed the opinion that the patient was suffering from a severe depressive state at the time of the attempt and in twelve others there were severe social or domestic disturbances. Two patients had menopausal symptoms; six cases had an anxiety state; five were epileptics and three were schizophrenics. The other cases at the time of the attempts had among them the following organic diseases: exfoliative dermatitis (skin condition not related to the barbiturate taken), congenital hemiplegia, disseminated sclerosis, pulmonary tuberculosis, duodenal ulcer, asthma, and severe essential hypertension. One was pregnant and unmarried. At least nine of these sixty-four patients gave a history of one or more previous attempts at suicide."

William D. McNally, M.D.,[5a] former toxicologist for Cook County and the Chicago Health Department, commenting on Richards' report cases suggests that, "It is very strange that of the large number of cases of acute intoxication and in cases which have been investigated by the Cook County Coroner's staff and myself, there has not been one case of automatism present itself."

Many writers of articles and textbooks on barbiturate poisoning have accepted without question Richards' conclusions based on the meager evidence of three cases. In discussing Richards' suggestions they have frequently embellished them. It is strange indeed that no writer has presented either a case record of his own or of any other physician in which "automatism" played any part. Few writers have even attempted to distinguish between the more rapid and the slower sleep inducing action of the different classes of barbiturates. No writer has discussed the fact that a person taking several single therapeutic doses would necessarily be sound asleep long before he could take a toxic, far less a lethal, dose. No writer has considered the fact that it would probably be physicologically impossible for a man who had taken a second therapeutic dose to manipulate the cork of a small bottle and obtain a third tablet without spilling some of the tablets, or dropping the bottle, cork or both, or failing to recork the bottle.

Samuel W. Goldstein[6] in an interesting paper on the nature of problems relating to the use and misuse of barbiturates wrote:

> "Many accidental cases of barbiturate intoxication are discovered and treated before death takes its toll. Frequently these individuals tell of having taken the usual dose of the drug which did not bring sleep. Then, in the mentally befuddled state induced by the barbiturate, they took more of the drug. How much more they did not know. Barbiturates have now achieved the questionable honor of being chosen as the chemical instrument of suicide, second only to carbon monoxide."

In a private communication Mr. Goldstein made this commendable statement:

> "You state that most references to this phenomenon stem from the report of Robert Richards, *Brit. Med. J.*, 331 (Feb. 24, 1934). . You may include my name in the list of those who made this statement based on literature reports rather than personal observation or interrogation of such cases."

Goodman and Gilman[7] had this to say:

> "Acute barbiturate poisoning may occasionally be due to what is called 'auto-

[5]Locket, S., and Angus, J., The Lancet, 1.580, 1952.

[5a]McNally, W. D., J. Mich. Med. Soc., 41:635-642, Aug. 1942.

[6]Goldstein, S. W., J. Am. Pharm, Assn., p. 11, Jan. 1947.

[7]Goodman, L. S., and Gilman, A., The Pharmacological Basis of Therapeutics, Sec. Ed., O. 146.

matism.' For example, failure of the drug to produce sleep may cause a confusional state in which the patient does not remember having already taken medication and he may unwittingly repeat an overdose."

In a private communication Dr. Goodman stated with the frankness that is characteristic of professional men of high standing that,

"Other than the three non-lethal cases reported by Robert Richards in 1934, I do not recall seeing published reports on the phenomenon 'automatism' in barbiturate poisoning."

Tatum,[8] writing for the Physiological Review five years after Richards' reported cases, commented:

"In many cases, perhaps the greater proportion, the poisoning is intended suicide; others develop a psychic dependence, and hence take the drugs in too large dosages, long after the need has ceased, and develop chronic poisoning; finally there is that peculiar condition spoken of as 'automatism' by Richards. In this condition the individual, having become accustomed to the use of the drugs, may at some time fail to have deep sleep develop. In this twilight zone, an individual does not exert normal inhibitions and reason, and hence mechanically takes all the remaining tablets or capsules. In these cases, the coroner's jury pronounces the cause of death as suicide, and so it is, but it should be recognized scientifically as unintentional or accidental suicide."

He cited no supporting cases, other than Richards' cases. How can anything be "scientifically recognized" on the sole report of three cases which were poorly reported in the first place. To speak of suicide as "unintentional or accidental" is sheer nonsense. Suicide is self murder or a deliberate and intentional taking of one's own life.

Shideman wrote:[9]

"Hence, self-medication is the most common cause of acute poisoning with the barbiturates, intended suicide probably accounting for the majority. Unintentional poisoning from self-administration may be the result of 'automatism.' Here the usual hypnotic dose may fail to produce sleep and the individual in a semistuporous state consumes all the capsules or tablets remaining in the container. Death, if it occurs, may be incorrectly labeled suicide but should be recognized as accidental suicide."

He presented no case records, although he was writing twenty-years after Richards' report. It is significant that he was content to adopt Tatum's inaccurate statements. So it is readily seen that the "pitch" is from Richards to Tatum to Shideman (and others) without a scintilla of the brilliance and accuracy of the double play from Evers to Tinker to Chance.

Eighteen years after Richards' paper was published, Dr. Salter[10] made this observation:

"Another problem which plagues medical examiners and coroners is the phenomenon known as 'automatism.' This situation has been authenticated numerous times. (*Comment*: This reckless statement is unsuported by case history or otherwise.)

"The sleepless patient has a bottle of capsules or tablets by his bedside. If the drug happens to be a slowly acting one, or if the patient is unduly resistant, he keeps on taking a tablet every ten or fifteen minutes, praying for sleep. Eventually he reaches a sort of semistuporous twilight zone in which, without understanding what he is doing, he continues automatically to take one tablet after another."

(*Comment*: This is an unwarranted assumption. It ignores the fact that the patient would have been asleep long before he could have taken an amount approximating a lethal dose.)

Twenty-three years after Richards reported his cases, the New England Journal of Medicine[11] published this statement:

"Undoubtedly, an occasional poisoning from automatism has occurred. This is an interesting phenomenon whereby the patient, after taking a dose of a barbiturate, forgets or at least thinks he

[8] Tatum, A. L., Physiol. Rev., p. 489, Vol. 19, 1939.
[9] Shideman, F. E., Drill, V. A., Editor, Pharmacology in Medicine, 1954, sec. 14, p. 12.
[10] Salter, W., A Textbook of Pharmacology, p. 102.
[11] New Eng. J. M., Vol. 256, p. 77, Jan. 16, 1957.

has not taken the drug and so takes another dose and yet another until he has ingested a poisonous amount."

A private communication from The Journal contains this comment:

"It is a well recognized phenomenon that patients who get a small dose of barbiturates do become confused and frequently think that they have not taken a dose of the drug. The problem of automatism may occur more frequently than is suspected. It is discussed in Goodman and Gilman, *The Pharmacological Basis of Therapeutics,* Second Edition by the Macmillan Publishing Company on page 146. Also by Salter in a *Textbook of Pharmacology,* Saunders, 1952, on page 102. Every textbook of note in the field of pharmacology has comments to say about automatism. As to the frequency of this phenomenon, I have no figures; and I imagine to secure such would be most difficult. However, there are apparently many authenticated cases where automatism has occurred, so that there is little doubt in medical circles that automatism does occur."

Goodman relied on Richards. Salter cited no authority and reported no case.[12] It excites curiosity to read in one sentence that the frequency of this phenomenon would be difficult to secure and in the next to learn that there are "apparently many authenticated cases where automatism has occurred." No writer has presented any authenticated case since Richard reported three cases twenty-four years ago.

Dr. Robert H. Felix,[13] Director, National Institute of Mental Health, in an interview said:

"We also know that it does something very bad to the judgment, so that probably many of the so-called suicides from sleeping pills are due to the fact that a person couldn't sleep and he took a couple. He still didn't get to sleep and he took a couple more. Still, he didn't get to sleep and by that time he had been sufficiently fuzzed up that he didn't realize how many he was taking, and he took a whole handful of them to do the job. He probably had no intention of killing himself when he started, but he just got all fizzed up."

How does he know that "he took a couple * * * and he took a couple more". Dr. Felix didn't say what class of barbiturate was taken or what the therapeutic dose was. He overlooked the simple fact that four therapeutic doses would have put the patient in dreamland. To lend drama to the occasion he continued, "he took a whole handful of them" and then added, "to do the job". It is suggested that the "job" was suicide.

I wrote Dr. Felix in part as follows:

"If you know of cases other than those described by Richards in the BRITISH MEDICAL JOURNAL of February 24, 1934, I would appreciate your letting me know of them.

"I would be grateful if you would tell me of a case where a whole handful of barbiturates was taken at one time."

His reply contained this statement.

"The basis for this comment is my own clinical experience and the clinical experience of many others in the field."

It is suggested that Dr. Felix should either prove the accuracy of his statements by authenticated cases or frankly recant his barren assertions which are too transparent to gain credence among scientists.

Fraser,[14] Isbell,[15] Thrower[16] and others have accepted Richards' idea of automatism, but none have reported any case in which automatism played any part.

It is interesting to note the marked similarity in the comments on the symptom which Richards termed automatism by all of the writers mentioned above. Such similarity can indicate only that the comments are mere "hand-me-downs" without careful consideration of the original source material.

Lucille M. Schroeder[17] brought an action to recover an accidental death benefit under the terms of a life insurance policy. She claimed that her husband took an

[12]I wrote to Dr. Salter requesting information about his statement and was told that he had died about five years ago.

[13]U. S. News and World Report, June 21, 1957, p. 65.

[14]Fraser, H. F. and Isbell, H., The Journal of Pharmacology and Experimental Therapeutics, Vol. 99, Aug. 1950.

[15]Isbell, H., Veterans Administration Technical Bulletin, T. B. 10-76, Aug. 15, 1951.

[16]Thrower, W. R., Journal of Forensic Medicine, Vol. 1., No. 2, Oct-Dec, 1953.

[17]*Schroeder v. The Manhattan Life Ins. Co.*, Docket No. 639-56, U. S. D. C., N. J.

overdose of sleeping pills accidentally. The insurer paid the face amount of the policy and denied liability for the accidental death benefit, asserting that the insured committed suicide. On the trial an attempt was made by her to show that the decedent took a large number of ethbral capsules, one after another, because his mind became foggy after the first or second dose.

The facts of the case were briefly these. A fifty year old man used alochol to excess on numerous occasions. The day before his death he got drunk. His wife thrashed him with a riding crop. She then fed him and he became sober. He drank no alcohol from 6:00 P.M. until 11:30 P.M. when he retired to his bedroom. His parish priest and physician saw him in the evening and described his conduct as rational. He was heard snoring ten minutes after he retired. He was snoring at 12:10 A.M. when his wife passed his bedroom door. He was found dead at 10:30 A.M. the same day.

Deceased had injured his ankle and 2 grain ethbral capsules had been prescribed. Ethbral consists of seconal, phenobarbital, and butisal. The purpose of the mixture is to produce an immediate and also a sustained action on the body.

An autopsy was performed the day he died and a chemical examination of certain organs was done. It showed 2.8 milligrams of barbituric acid ester per 100 grams of brain tissue. On the trial the proof showed that the cause of death was barbiturate poisoning,

Defendant called Milton Helpern, M.D., Chief Medical Examiner of the City of New York, as a medical specialist. He was asked this question:

Assume that decedent weighed 180 pounds and had taken an unknown number of 2 grain ethbral capsules. He retired to his bedroom at 11:30 P.M. and was heard snoring ten minutes later. He was still snoring at 12:10 A.M. when his wife passed his bedroom door. He was found about 10:15 A.M. the same day with bubbles of air coming out of his mouth. He was pronounced dead at 10:30 A.M. and an autopsy was performed the same day. 2.8 milligrams of barbituric acid esters were recovered per 100 grams of brain tissue. The stomach contents weighed 295 grams, including 50 grams of a green shiny substance containing a high value of barbiturates. Assuming all of these facts, have you an opinion, based on reasonable certainty, as to the approximate number of 2 grain ethbral capsules that decedent must have ingested to have 2.8 milligrams of barbituric stop acid esters per 100 grams of brain tissue?

The answer was "Yes". He then explained:

"One has to estimate the amount of barbiturate that would be present if the whole body were available for analysis, and with the assumption that the extract was one hundred per cent. When an extract like that is done, the toxicologist doesn't get it all out. It is very difficult to get all of the barbiturate out, so that, if 2.8 milligrams were recovered in 100 grams of brain, and the man weighed 180 pounds, and if you consider that the barbiturate is not evenly distributed in the organs, and in order to be on the conservative side you assume that the concentration found in the brain would represent an average of a concentration of half the body weight, in other words, discount half the body weight to provide for those tissues that do not have the same concentration as the brain would have, so that you can reduce the body weight to 90 pounds, and with a finding of 2.8 milligrams per 100 grams of brain, it is my opinion that there would be 17 grains, but that does not take into consideration the amount of barbiturate that would be destroyed in the body. We know that one of these component parts, the seconal, is very rapidly destroyed; so that what is found is more likely to be the least rapidly destroyed substance, such as the phenobarbital and the butisal. If you consider the fact that you can't—that some of it has been destroyed, that you don't get one hundred per cent recovery, you have to add to that 17 grains, and then you also added the amount in the stomach, you see, which I didn't consider in this calculation, that would make it even more. So that the most conservative estimate would be 17 grains. Add to that what was destroyed by the body after ingestion, add to that the amount that could not be extracted, and the amount in the stomach, and you will come up with an amount considerably more than 17 grains. It would not be an overstatement to say that the total

amount in that body might be nearer 30 grains. I would say that at least 30 grains was ingested. I think if the body could be completely analyzed, and we could consider the amount in the stomach, plus the amount in all the tissues, and the fact that the extraction wasn't one hundred per cent complete, you would come up with well over a result of 20 grains. If we calculated merely on the basis of half the body weight, and 2.8 milligrams in 100 grams of brain, then you come up with 17 grains as the minimum; but that can't represent the whole amount."

Dr. Helpern was then asked if he could convert his findings into the number of 2 grain ethbral capsules taken. His answer was that it would range between eight and one-half to sixteen capsules.

Defense counsel having produced this evidence, then sought to show that it was not probable for a person to take eight and one-half to sixteen 2-grain capsules of ethbral one at a time over a period of several hours. An objection was made to an appropriate question, and in overruling the objection the court said:

"But as I understand the theory of the defense, it is that, by reason of the potency of this type of barbiturate, the immediacy of the action of the seconal coupled with the holding effect, for want of a better term, of one of the other constituents of the pill, that after the ingestion of one or more in a series, the effect will be such that the individual could not continue to take more."

Dr. Helpern then expressed this opinion:

"In my opinion, that would be impossible in this particular case, because, had this person taken these pills or capsules one at a time over a prolonged period of time, the effect would prevent any accumulation of barbiturate in the system with a value of 2.8 milligrams. * * *

"So that I would say that the results here completely nullify any such interpretation and prevent any such interpretation. The only conclusion you can come to, and the only reasonable conclusion you can come to, is that this man ingested many of these capsules at one time in order to build up this concentration in his brain at the time of his death."

On cross-examination, his opinion increased in strength.

"* * he could take one at a time within a very short time. * * * I don't think he could take one at a time over a period of an hour. I think that these things would have a sleep-producing effect on him so that he never could build up that concentration.

"* * In other words, if he took one of these capsules, you see, and then the effect wore off, and then he took another capsule and the effect wore off, you never could build up this concentration.

"Now then, you want me to assume that after he took the first capsule, he got confused and took a whole bottleful and didn't know what he was doing.

"Q. Could that have happened?

"A. If it happened, I would not say it happened in the nature of his not knowing what he was doing. I think anyone who is using these pills all the time knows what he is doing when he is taking them, and I base that on experience on having gone through cases of this sort. The whole trouble with that theory, where you take one and then you forget, and then an hour later you take another, that is not consistent with the concentration you build up; and just by the same token that he is taking another one, to assume that he is going to take fifteen or sixteen, it would be highly improbable.

"Q. You may differ with that theory, Doctor, but it is a theory of medical men, also, that they can be taken one at a time, and then the person loses count, doesn't realize he has had several of these pills, and then may take a lethal dose, isn't that so?

"A. He may lose the count, but he would never lose it to the point of building up 2.8 milligram concentration "in the brain, you see. In other words, what I am trying to say—let's assume that a man is taking pills carelessly; and a half hour later, he takes another, in a half hour, he takes another, and he is over-dosing himself. He will go to sleep."

In addition to finding 2.8 milligrams per 100 grams of brain tissue, 50 grams of

a green shiny substance was found in the stomach contents. This was probably the partly dissolved colored gelatin capsules in which the drug was dispensed. When a person dies soon after taking the drug, a large quantity recovered from the stomach contents and viscera would substantiate a finding of suicide if the possibility of homicidal poisoning can be eliminated.

"A small amount of the drug may be recovered from the tissues when a person lives two days or more. This fact does not mean that a small amount was ingested. If the survival period is longer, over two days, the amount of barbiturate in the stomach and parenchymatous organs will be much less, as much of the drug will have been excreted or destroyed. The period of survival must always be considered in appraising the result of the toxicologic examination, and investigation of the circumstances of the poisoning is necessary for the classification of the case. * * * In determining what amounts are significant all due consideration must be given to the period of survival after the poison has been taken. In some cases the victim may survive long enough for almost all the barbiturate to be eliminated and death occur from exhaustion or bronchopneumonia."[18]

In any case where the evidence shows that the deceased took an unknown number of barbiturate tablets, each containing a therapeutic dose, regained consciousness and then made a statement that he took two or three tablets and had no memory of taking any more, medical evidence should be introduced to show that sleep would have been induced long before the decedent could have taken a lethal dose. Such testimony should overcome any such statement imputed to the deceased that he took an overdose accidentally.

The following suggestions may be helpful in the defense of a suicide case where barbiturates caused the death and automatism has been hinted by plaintiff's council.

1. The court should be requested to instruct counsel for the beneficiary not to discuss the subject of automatism in his opening remarks to the jury.

2. Any attempt to introduce opinion evidence relating to automatism, where there is no basis in fact for it, should be met with the objection (a) that there is no foundation in the proof in the case for it, and (b) that such evidence is irrelevant, speculative and uncertain medically. On proper objection, courts should not permit its introduction on cross-examination of the insurer's medical witness under the flimsy guise of testing his knowledge on the general subject of barbiturates.

3. Testimony that decedent made a statement upon regaining consciousness may only be admitted as an exception to the hearsay rule.[19] A statement such as, "I only remember taking two tablets", should be held to be inadmissible under the exception to the hearsay rule relating to statements uttered under stress of excitement produced by a startling event, made before declarent had time to reflect or invent. A patient regaining consciousness in a hospital ward might readily exclaim, "where am I?", and upon being told exclaim, "I wanted to die." But a statement relating to memory of a fact would be elicited only by questioning by a physician or other questioning general subject of "Why did you do it?"[20] It is also doubtful that a declaration as to the memory in explanation of previous conduct would be admissible as an exception to the hearsay rule, particularly where the statement would tend to be exculpatory of questionable conduct.[21]

Statements imputed to decedent are frequently given by persons financially interested in the outcome of the lawsuit. It is easy to fabricate or color testimony which lies almost wholly in the control of the person producing it.

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[18]Gonzales, Vance, Helpern and Umberger, Legal Medicine, Pathology and Toxicology, Sec. Ed., pp. 820, 821, 822.

[19]This paper is not the place to discuss exceptions to the hearsay rule generally. But see Seligman, An Exception to the Hearsay Rule, 26 Harv. L. Rev. 146; Hinton, States of Mind and the Hearsay Rule, 1 Chic. L. Rev. 394; Hutchins and Slesinger, State of Mind to Prove an Act, 38 Yale L. J. 283; Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229; McCormick on Evidence, Chap. 30; Res Gestae, 163 A.L.R. 15.

[20]Wigmore, Evidence, Secs. 1745-1747; *Trouser Corp. v. Goodman & Theise*, 153 F. 2d 284, 287; *Allen v. Mack*, 345 Pa. 407, 28 A. 2d 783.

[21]In will cases declarations of testator to show his previous acts have been admitted. *Gilliland v. Dobbs*, 234 Ala. 364, 174 So. 784; *Eder's Estate*, 94 Colo. 173, 29 P. 2d 631; *In re Roeder's Estate*, 44 N. M. 429, 103 P. 2d 631. Contra, *Boyle v. Meeker*, 28 N.J.L. 270.

Conclusion

1. When a large concentration of barbiturates is found in the tissues, it is abundantly clear that the deceased did not take the pills one at a time over a prolonged period of time. A large concentration of the drug in the tissues implies the ingestion of many pills at one time.

If a person took a therapeutic dose and in five or ten minutes took another and five minutes later still another, the drug would induce sleep and a large concentration could not be built up.

2. The recovery of a small amount of the drug from the tissues when the victim survives two days or more does not suggest that a small amount was ingested.

3. The marked similarity of the esoteric discussion of Richards' conclusions is cogent proof that the information is being passed along from one writer to the next without careful consideration of the original material or its source. To affirm the soundness of Richards' conclusions on the meager evidence of his three cases is an appeal to credulity which ought not to be attempted in an intelligent society.

Anatomy and the Law*

WALTER L. HARD, PH. D.**

THE KEYNOTERS, the presidents of your respective professional societies, have outlined the purposes and significance of this conference in a most capable manner. However, since there is nothing more painful than the undelivered address, I trust you will permit me the opportunity of speaking now, as a medical educator, to indicate my appraisal of the significance of such a program. It is self-evident that the sponsorship of such a conference implicitly suggests an ever growing interrelationship of medicine and the law. In point of fact it would seem to me that it is no longer an interrelationship but actually an interdependence. It suggests that the problems which beset both professions in relationship one to the other can best be resolved by mutual discussions of an open forum type such as are planned for this program. But it also suggests to me that education in the professions does not terminate with the awarding of a professional degree, but rather for those to be successful in their chosen field demands a continuation of education in which this conference, and your participation, is an expression.

It is redundant to note that medical practice in this scientific age has changed markedly in the past decade and that perhaps some of the changes so characteristic of practice today are responsible for a greater reliance upon the legal profession. But I also note that society has changed and although medical practice is offering society more in the way of health protection and services than ever before, society is demanding more. Out of this interplay between medical practice and society come most of the factors which are responsible for an ever greater relationship between medicine and the law. This view may be emphasized by noting that our own medical school, like many others, has for the past decade offered a series of lectures, made possible through the cooperation of our law school, to our students on the general subject of medical jurisprudence. But it probably is safe to say that the content of these lectures, and perhaps those generally offered in medical schools, have been rather self-limited to a discussion of the physician-patient relationship.

Those of us in medical education are acutely conscious of the fact that medicine has so changed in character in relation to society in recent years that this limitation of the field of medical jurisprudence means that the recent graduate is ill-prepared "legalwise" to meet all the challenges placed before him by society through his practice of medicine. One need only note that the business side of medicine such as hospitalization and surgical insurance, the Blue Shield program, veteran and medicare programs, etc., all have their legal ramifications. Then one need only recognize the increase in malpractice suits, the demands on the physician to serve as expert medical testimony for compensation claims, accident cases, and hosts of similar legal actions, to appreciate the magnitude of the problems.

All of this simply means that medical schools are faced with the problems of providing the medical graduate with a better understanding of the law if he is to be adequately prepared to meet the responsibilities of modern practice. It is a little discouraging for us to report that how and to what extent this area can be assimilated within the medical educational program is still unresolved. But this only serves to amplify my opening remarks to note that physicians must take it upon their own initiative to embark on a self-educational program such as is represented by this conference.

By this same token, one is impressed that the modern legal graduate is perhaps not too conversant with medicine and that there seemingly should be a responsibility assumed in our modern law schools to acquaint law students with at least the rudiments of medical terminology and ethics, as well as the doctor's position in society, in order that they can better discharge their responsibilities to the public. I view, then, a conference of this type as essentially an educational procedure in which members of both professions can

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presumably exchange ideas and, more significantly, can better appreciate the attitudes and philosophies of the other profession.

The subject assigned me has been "Anatomy and the Law." The study of human anatomy provides the very foundation of medical practice and indeed the modern era in medicine stems from the vesalian school of anatomy. To condense any significant fraction of this area of study into a meaningful presentation would be a much more heroic effort than I should like to entertain.

First of all, it would seem that from the standpoint of cases presented in court today, we are primarily concerned with the traumatic aspects of medicine. I refer to such things as automobile accident cases, employment compensation cases, and the anatomical aspects of homicide. The question presumes that were I to be responsible for representing the interests of a client before the jury in the court, what would be the nature of some of the problems confronting me? One would make sure he had available expert medical professional testimony. But it is my impression that this testimony must frequently be converted into a language readily understood by both the jury and the court. It is in this area, then, that the attorney must necessarily familiarize himself to that degree whereby he lends confidence to his presentation with his understanding and interpretation of medical testimony. To give just one example, virtually any case dealing with a neurological examination will encounter the term "plantar stimulation." I can well envision that a jury in the state of South Dakota, typically agricultural in character, would immediately interpret "plantar" as certainly something to do with the seeding process, and "stimulation" as perhaps one of the many growth stimulants so commonly employed on the farm today. Obviously "plantar stimulation" refers to the stroking of the sole of the foot in an effort to illicit a given reflex.

Terminology, then, becomes one of the first and perhaps most important consideration in anatomy with which one must become familiar. Investment in a medical dictionary could fulfill this need. In this same context, a few basic books dealing with such subjects as anatomy, neurology, fractures, and head injuries would serve as invaluable guides for the better understanding of the medical aspects of any given case. Specific titles can easily be acquired from any medical library.

I think we all would be in agreement that the greatest increase in the number of legal cases involving medical testimony surrounds the great increase in vehicular accidents. Since some forty percent of these cases fall in the category of head or neck injuries, I have decided to attempt to show how a little application of the anatomy of the head and the neck can immediately be applied in an understanding way.

The aftermaths of these automobile accidents in traumatic cases will invariably attain legal status as a result of any one, or combination of, four posttraumatic effects. These are, not necessarily in order, (1) the incurrence and persistence of pain following injury, (2) the occurrence and persistence of some type of motor dysfunction which is self-limiting, (3) the occurrence and persistence of some type of mental disturbance and (4) cosmetic damage. I shall not take these up in detail and, indeed, insofar as cosmetic affects are concerned, I think the application of anatomy is perfectly obivious: namely the losses of an eye, ear, nose, or disfiguring scars, are sufficiently self-limiting as to limit or prevent gainful employment, and even psychological effects may be sufficient to result in a substantial cause for legal action.

I have elected to utilize two relatively common types of traumatic injuries to suggest the role that anatomy may play in the interpretation of the medical aspects concerned in such medico-legal cases. These two types of accidents would be classified as the so-called whiplash injuries of the neck and traumatic blows to the head. It is to be emphasized that I am neither qualified, nor am I concerned here, with the strict medical or treatment aspects of these cases. My purpose is to attempt to show how an understanding of the anatomy may aid one in the interpretation of the case at hand.

Man has certainly shown great ingenuity in his ability to engineer a 300 horsepower, chromium plated juggernaut capable of excessive speeds, but has shown a noticeable lack in design of safety factors to implement this automobile, and has failed

utterly to recognize that the pace of evolution of the human body would require an eternity for it to adapt to the battering ram effects that are imposed upon it frequently from very simple automobile collisions. The whiplash injury is a case in point. This refers to injuries which are sustained either from a direct headon crash with some stationary object or injuries sustained from simply being seated in car at rest but having it struck by another moving vehicle. Automobile testing has proven that it may take very little in the way of speed to result in a rather serious injury. Instances are reported' where pain in the head and neck have followed the abrupt halting by impact of a car moving at only five miles an hour. Similarly, crash halts from speeds of only twenty miles per hour may not only injure neck structures from the whiplash but sufficient energy may cause the body to be pushed into the seat frame with sufficient force to result in injury to the lower spine.

One of the prominent symptoms of the whiplash injury, and that which may bring it into legal hands, is the pain symptom which is characteristically felt over the head region but may involve shoulder and arms as well. Let us consider the basic anatomy that is represented in an injury of this type. The head is a box weighing about twelve pounds sitting on a rather tremulous support, the cervical spine, made up of seven movable parts each articulating with the other. The problem would not be so complicated if it were not for the circumstance that the center of gravity in this twelve pound box is not at the base of the skull where it rests on the spine, but it is in the midpoint about four inches above so that any movement of this box gets a sort of pendulum effect and this additional potential leverage is a factor contributing to the injury.

On the anatomical skeleton you can readily view the skull resting on the seventh cervical spine or vertebrae and the fact that these vertebrae are so arranged as to make in the normal position a slight curvature with the convexity directed forward or anterior. It should be immediately emphasized that between each two successive vertebrae emerge a pair of nerves. Further, these vertebrae are held together by ligaments and, even more importantly, by a series of muscles which serve to not only hold them together but to make possible movements and to resist excessive movement.

It is not difficult to understand that, if the body encounters a blow or movement which results in this head to be snapped forward or back beyond the excursion point of these muscles, there will be tearing of ligaments, tearing of muscles and soft tissue injury. This type of an accident may not express any change on an x-ray film and this leads to complications. However, a characteristic of bruised tissue is hemorrhage, tissue swelling, a slowing of blood flow and disturbances in metabolism. With these factors operating on nerve tissue the resultant effect is pain.

The question presumes how it is possible to encounter pain in the head in these injuries when the site of damage is down in the neck. Well, again, this is the application of fundamental anatomy. Emerging particularly from the upper two or three cervical nerves is a very major nerve which winds its way between muscles to gain access to the back of the scalp on the head. Irritation then along the course of this nerve may result in an expression of headache, a common symptom in injury of this type.

Now we can go one step further and identify an individual who has incurred a more serious whiplash injury. An x-ray of an individual who incurred a whiplash injury four months prior to the taking of the x-ray, may show a perfectly straight cervical spine which can only result in relative rigidity of the neck and the head. Still a more traumatic injury would be disclosed by x-ray picturing a normal cervical spine and its appearance after a severe whiplash injury in which the upper vertebrae are squeezed together posteriorly or backward while the lower vertebrae are squeezed together in an anterior direction. This would come about by the application of forces with the head snapping back and then rebounding forward. The individual with this injury may experience pain not only in the head also radiating down the arm.

How is it possible to get pain in the arm when the site of the injury is in the neck? Reference was made earlier to the occurrence of emerging pairs of nerves between successive vertebrae. It so happens that the nerves which primarily supply our cutaneous areas of the skin down in the hand and fingers take their origin from

these lower cervical neck segments, so that the squeezing and displacement of these vertebrae can be presumed to have put pressure and tension on these nerves at the point of their emergence between the vertebrae, and the brain in interpreting this injury, not where it happens but actually where the nerve normally was intended to function, namely, at the cutaneous ends of these nerves, down the arm to the hand and fingers. This is a simple application of an anatomical principle.

Thus far we have limited our discussion to injuries of the neck structures and have referred only to the identity of pain. You will recall that I mentioned two other posttraumatic effects which frequently bring individuals into legal hands for settlement of claims: namely, emotional or behavioral changes and some motor dysfunction such as paralysis.

Let us assume that either the whiplash injury or a direct traumatic blow to the head is sufficiently damaging to have resulted in altered behavioral characteristics of the individual. Perhaps from an intelligent, self-sufficient, socially well oriented individual he becomes dull, forgetful, incapable of proceeding on any planned course of action, and becomes socially withdrawn. What is the anatomy involved that could contribute to an understanding of cases of this type?

Let us consider a human brain fixed in formaldehyde and hardened in alcohol and therefore it feels rather rigid, fixed, and relatively unyielding; it appears and handles like a solid. In the living state, however, this brain would have the consistency of a bowl of jelly or roughly 99% water. It is not rigidly fixed within this calvarium, the skull, so that movements transmitted to the skull impose some movement of the brain. Now if you would visualize a severe whiplash injury with the skull being thrown violently in any one plane, the brain, because of its consistency, is liable to traumatic damage against the sides of this skull box. We may visualize a drawing modeled from a jell which was pumped inside the skull and the skull rotated or accelerated in just one plane. We would note there are marked signs of pressure defects in these frontal and temporal areas. Examining the skull we would note that it is essentially smooth, excepting the frontal, basal, and temporal areas in which these very parts of the brain come into relation. In short, the traumatic effects have caused the brain to be pushed, shorn, or perhaps even lacerated on these roughened protuberances within the skull with resultant hemorrhage and brain damage.

It need only be pointed out that these self-same areas of the brain, such as the temporal and frontal lobes, appear to be primarily concerned with such diverse entities as intelligence, memory, social behavior, and emotional responses.

For purposes of illustrating the application of anatomy in the interpretation of motor paralysis, I would use the following example. A woman was disembarking from a bus near her home and was struck in the head by the self-closing doors. She probably suffered a mild concussion, but immediately recovered and walked on into her home. The next morning she awakened to the realization her right arm was paralyzed. Again referring to the brain, it appears rather homogeneous in terms of general appearance made up of a series of ridges (gyri) and valleys (sulci). Actually we can find our way around on the surface of this brain rather easily by knowing two or three landmarks. One of the most prominent from the standpoint of medical application is the central fissure. Were you to stimulate, by placing electrodes immediately ahead of this fissure, one would find that this entire area controls our volitional motor system. Further, there is specific localization for the muscles of the body along the course of this gyrus. For example, control of muscles of the leg is located toward the top, next the trunk, then the arm and the head region near the bottom of the gyrus. We are actually standing on top of our head, or inverted as it were, insofar as motor representation is concerned.

Possibly the sequence of events in this case would be that the blow forced the brain with sufficient traumatic effect against the side of the calvarium as to hemorrhage some of the small blood vessels on the surface of the brain and, in particular in the arm area, with the resulting effect that this part of the brain was, of course, deadened and motor control for the right arm was lost. It is to be emphasized that this traumatic effect was on the left side of the brain, for actually the right side of the body is controlled by the left cerebral hemisphere and vice versa. This

case could be argued on several other merits from the standpoint of its medical or neurological aspects but my only purpose has been to illustrate how a knowledge of the anatomy of the brain could be applied to explain this type of paralysis.

Whether I have succeeded in clarifying, or only confusing you, in the interpretation and application of anatomy is a decision only you can evaluate. It will have been my hope to have left the impression that anatomy, stripped of its scientific and specific nomenclature is an understandable science of wide application.

I will conclude by making a personal observation as it relates to the importance of the role of the legal practitioner in relationship to medicine.

It is readily understood that the lawyer has a responsibility to represent his client in the best possible interest. This after all deviates not at all from the highly moral and ethical standard of practice which typifies the medical practitioner in his relationship to the patient. However, there is eminent danger that the overzealous prosecution of cases and probably in the absence of inadequate scientific fact, may possibly through court action provoke a dictation as it were on the direction that medical practice will take and potentially limit the quailty of medical practice. Let me cite one example. Recently the courts in California have invoked the application of the doctrine of "res ipsa loquitur" in the consideration of several malpractice suits resulting from alleged injury due to the administration of spinal anesthetics.[2] It is worthwhile noting what a profound effect these court rulings have had on administration of spinal anesthetics in the state of California. One author has written, "It is a sad commentary on court misunderstanding of scientific facts when a physician must deny the patient the advantages of a particular type of anethesia because of the possibliity of a malpractice suit." This is only by way of emphasizing then that you, as legal practitioners before the bar, have potentially a real influence on, and therefore a very significant responsibility for, the type and quality of medical practice in the country. It seems worthwhile to suggest that there may be occasions when the best interests of medicine in its practice for the benefit of the public welfare become more significant than the merits of an individual claim. It occurs to me that a more thorough undertsanding of medicine in its scientific, social concept, on the part of the legal profession, would go far in removing certain limitations on the medical practitioner.

But in voicing a plea for greater understanding and concern of medicine by the legal profession, I would be amiss not to observe that the medicine profession must also accept a degree of responsibility. It is true the doctor is not a "warranter of cures" but there are numerous echelons within the machinery of organized medicine, without recourse to the legal profession, to adequately deal with the negligent, the unethical and the incompetent when leadership is properly exercised by those in position to act. One must conlude that such unfavorable court action, referred to above, which serves to affect the type and quality of medical practice may possibly be interpreted as a failure on the part of medicine to represent its best interests before the legal profession.

In short, if these medical-legal conferences are productive of nothing else than a closer understanding of the mutual problems faced by both professions, each in relation to the other, then certainly you should claim a substantial degree of success with benefit to all.

The famed physician Sir William Osler once offered this admonition, "Act in the manner that will make you under all circumstances true to yourselves, true to your high calling, and true to your fellow man." We would avoid creating quite so many problems, if all of us could conduct our affairs within the confines of such a truism.

LITERATURE CITED

1. Symposium on Whiplash Injuries. International Record of Medicine, Vol. 169 (1), 1956.

2. Wasmuth, Carl E. Court dictation of choice of anesthesia. Cleveland Marshall Law Review, Vol. 6 (3), pp. 461-472, 1957. Medical literature is replete with treatises on whiplash injuries but the reader may find the following recent papers of interest.

3. Frankel, Charles J. Medical-legal aspects of injuries to the neck. Journal of American Medical Association, Vol. 169, pp. 216-223, 1959.

4. Seletz, Emil. Whiplash Injuries. Journal of American Medical Association, Vol. 168, pp. 1750-1754, 1958.